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# WHAT DO GREEKS BELIEVE ABOUT ELDERS AND MENTAL CAPACITY?

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**Abstract:** *Despite the plethora of studies abroad, in Greece views on individuals with intellectual disabilities and older persons with mental health problems is not a well investigated topic. The results of the present study reveal that generally acts with financial-legal implications (mainly financial decision-making capacity) are of concern to the participants, as they consider this sort of capacity the main predictor for legal (in)capacity on the whole, especially when they consider elderly patients. Participants have doubts about the appropriateness of the current assessment methods followed by forensic psychiatrists and psychologists in Greece and hope for future improvements in the field of legal capacity assessment. In addition to that participants seem to welcome any form of provided information (live lectures from conferences, videos, interviews, discussion forums and texts) from experts with an emphasis on issues for elders. No significant differences were found in the expressed views based on gender or age, but subtle differences were found according to educational level.*

**Keywords:** *attitudes, mental capacity, law, elders, Greece.*

## Introduction

In health care there is an ever growing interest in elderly patients suffering neurological or psychiatric disorders[1]. However, legal issues concerning not only the clinical, but also the legal, aspects of these patients are not adequately represented in everyday discourse. More specifically, the evaluation of mental or decision-making capacity regarding medical and legal issues still remains a hard problem to solve and therefore seems to be neglected. Children, adults and elders, patients or not, must have the capacity to receive, comprehend and utilize the information with which they have been provided, not only in dealing with everyday problems, but also in clinical and legal settings[2]. Legal capacity is a person's capability and power under law to engage in a particular undertaking or transaction or to maintain a particular status or relationship with another person and for this reason it constitutes a critical intersection of law and clinical practice[3]. Legal capacity is linked and interchangeably used with the term civil capacity. Civil capacity assessment can take many

[1] Capisizu A, Aurelian SM, Bogdan C. Medical and legal aspects of elderly patients with dementia. Romanian Journal of Legal Medicine. 2014; 22: 51-54.
[2] Tepper AM, Elwork A. Competence to consent to treatment as a psycholegal construct. Law and Human Behavior. 1984; 8: 205-223.
[3] Alzheimer Europe. Greece: Legal capacity and proxy decision making. 2010. Chapter accessed online on 10 April 2014 http://www.alzheimer-europe.org/Policy-in-Practice2/Country-comparisons/Legal-capacity-and-proxy-decision-making/Greece

forms, such as assessment of specific capacities concerning medical consent, capacity for sexual consent, financial capacity, testamentary capacity, driving capacity and capacity for independent living[4, 5, 6]. All these terms have at their base the decision-making capacity of individuals, which requires multiple cognitive functions (such as memory, executive skills etc.)[6]. Of course, in Greece there is an unsatisfactory definition and vague explanation by the Greek Civil Code (articles 127-152), which states that generally, minors, individuals with mental disorders and individuals under the influence of drugs or alcohol have no right to enter into any legal contracts[7]. The above create a series of theoretical questions in ethics and, more practically, in situations of guardianship in legal courts, which require a legal determination regarding loss or conservation of competency for individuals.

The aim of the present study is to investigate further the views that contemporary Greeks have on issues concerning law, medicine and psychology, and to record, for the first time, their opinions about clinical-legal capacity generally for patients with neurologic and/or psychiatric diseases and, more specifically, for elders with a diagnosed mental disorder, and to determine what kind(s) of information the Greek public is seeking and in what form.

**Method**

During 2014, a total of two hundred fifty-three healthy participants (96 men and 157 women, with ages ranging from 18-80 years) from different geographical areas throughout Greece, took part in a public opinion survey on mental capacity. Participants were categorized by age into young adults (ages 18–35 years; $n$ = 89), middle-aged adults (ages 36–55 years, $n$ = 104), and older adults (aged older than 55 years, $n$ = 60). In addition, they were categorized according to their educational level and their current occupation as 120 students (30 medical students, 28 law students, 32 psychology students, and 30 students from other non-relevant specialties), 101 professionals (35 medical doctors, 37 legal professionals -26 lawyers and 11 notaries- and 29 psychologists, and 32 laypeople with occupations ranging from workers to professors). Nearly half of the participants were relatives of living elders who were healthy or patients with a memory problem (79 male, 175 female). Of these, 60% were adult children companions of elder patients, 30% were wives or husbands and 10% were assistants. Nearly all of them had a frequent communication (at least once a week) with elderly patients. Geographically, 54% were citizens of Thessaloniki, and the remainder were living in rural nearby areas (46%). In order to collect the information, a 20 closed-and-open type questionnaire was used, which the participants completed by themselves. So, the participants completed a brief 5-point Likert scale questionnaire (consisting of statements from strongly disagree to strongly agree, which was previously used in another study[8] about general capacity assessment issues regarding different groups of mental health patients (e.g.

[4] American Psychological Association. Assessment of older adults with diminished capacity. A handbook for lawyers. American Bar Association Commission on Law and Aging-American Psychological Association; 2005.

[5] American Psychological Association. Assessment of older adults with diminished capacity. A handbook for psychologists. American Bar Association Commission on Law and Aging–American Psychological Association; 2006.

[6] Demakis GJ. Civil capacities in clinical neuropsychology: Research findings and practical applications. New York: Oxford University Press; 2011.

[7] Greek Civil Code. Athens: Athens Bar Association Publications; 2012.

[8] Giannouli V, Vlaikidis N, Koutsouradis A, Tsolaki M. Views on contractual capacity for patients with neurological disorders. In: Vlaikidis D. Proceedings of the 1st Conference "Recent Developments in Neurology and Related Fields"; 2013 Oct 10-12; Greece, Thessaloniki; p. 29.

patients suffering from schizophrenia, bipolar disorder, dementia patients etc.) and on more concrete capacity issues concerning elderly people and more specifically the elderly person they accompanied or with whom they lived with. In addition to that, they were asked about what kind of information they need, how they would like to receive that information and by what means - in which form. There was also a brief semi-structured interview with each of the participants regarding clarifications on their personal answers.

**Results**

The participants revealed an interest (agree and strongly agree statements) primarily in what is going on in Greece (97%), in what is going on in the European Union (76%), and in what is going on internationally/abroad (63%). The group for which they believe that they need the most information is the elderly demented patients (88%) and secondarily the group of adult patients with psychiatric disorders (e.g., schizophrenia) (43%). Concerning the question of what kind of legal issue they consider to be the most important, the vast majority indicated that they believe that financial decision-making capacity issues in the form of sales, purchases, loans, leases, donations and testaments are in the heart of contemporary law problems in Greek courts generally for 'incapacitated adults' (87%) and more specifically for elderly patients suffering neurocognitive disorders (90%), and they believe that this form of capacity is the best predictor for legal (in)capacity on the whole (72%). Of course, the group of non-expert participants (that is those who did not have a formal education in medicine, law or psychology) could not indicate the way(s) or relevant questions to be answered by experts for the clarification of this issue (94%), but all of the participants (experts and non-experts) indicated doubts about the appropriateness of the current mental capacity assessment methods followed by forensic psychiatrists and psychologists not only in Greece, but also worldwide (93%) and expressed hope for future improvements in the field (98%). Other topics that occurred (with the exception of autonomy versus guardianship issues-legal protective measures for general decision-making capacity (95%) and more specifically financial capacity (90%)) were about elder abuse and human rights law (85%), involuntary hospitalization (79%), medical malpractice (74%), and disclosure of private information with an emphasis on the diagnosis and information retained as medical health records (64%). No significant differences were found for the above themes in the views of men and women ($p>.05$), younger and older participants ($p>.05$), more and less educated participants (university graduates, lawyers, doctors versus high school and primary school graduates) ($p>.05$) and participants living in urban or rural areas ($p>.05$) for all of the above questions following T-tests and one-way ANOVAs, which are in line with previous findings coming from a much smaller sample [9]. Furthermore, when the same participants were asked if they wish to get more information on these issues they uniformly replied in a positive way (5 out of 5 on the Likert scale), without showing a statistically significant difference in their preference about the provider of these information (whether it is the state or a private institution).

When asked to indicate the ways that they would prefer to get informed on the above legal, medical and psychological issues for the elders, they responded, regardless of their demographic characteristics, that they would need online information (88%), although when asked if they find the internet as an easy way to get informed, only 74% responded in a positive way. Mainly negative answers were given by the group of middle-aged and older participants with a low educational level (basic primary education). The majority of the participants did not show preference for a specific form of open access information, but they uniformly proposed that a future online platform could contain videos from lectures coming from conferences or TV shows, interviews with experts, discussion forums and texts written by the experts themselves. A differentiation was found only among the groups of health and law professionals. Doctors expressed a strong desire, in the given open questions, to get more information primarily on the basic principles of civil and secondarily on penal legislation.

Doctors main question was how the law protects an individual when she/he cannot make decisions for herself or himself.

On the other hand, lawyers and notaries focused less on the legislative framework and more on the basics concerning the clinical picture of the patients, the symptomology and the ways of determining or noticing mental disorders in the elderly. As a second point, both groups expressed the desire to get more detailed information on the intersection of the two fields as well as on the state-of-the-art in their own field. Laypeople did not show a specific similar pattern in their preferences but indicated they lack completely official or unofficial information on these issues. Finally, when asked if they would prefer to get informed and at the same time retain their anonymity, 89% responded in a positive way, which means that a future initiative should take care not to display personal data of visitors and (if in an electronic form) should not demand a login function.

**Conclusions**

In conclusion, these results of rounded percentages suggest that today Greek citizens show a uniformly negative overemphasis solely on specific acts which have both legal and financial implications. Greeks believe that elder law is an insufficiently researched area, and their primary concern is with estate planning and administration, health-care issues (patients' rights about informed consent treatment decisions and end-of-life decisions) and general guardianship decisions. The findings indicate that a large percentage of Greek people who are concerned with the financial decision-making capacity of elder patients for financial-contractual issues, along with the finding that elder patients (even those with Mild Cognitive Impairment) face serious difficulties in the above mentioned fields[9], may demonstrate more fully the necessity of applying legal initiatives similar to the Mental Capacity Act 2005, which is an Act of the Parliament of the United Kingdom with the primary purpose to provide a legal framework for acting and making decisions on behalf of adults who lack the capacity to make particular decisions for themselves[10].

The staggering finding of the present research is that the Greek society, as a whole today, is composed of a majority of individuals who tend to focus on contract law, and more specifically on diminished decision-making capacity for finances. This restriction of general interest to ethical questions with legal/financial implications may lead future research to focus on how public opinion changes might occur over time on the issue of property possession and control for patients with mental illness and on the clarification of the possible cultural factors that may shape public opinion across different ethnic groups on possible medical or legal malpractice concerning elderly patients. Of course, the Greek public demonstrated a remarkable thirst for a wide range of information, and due to the lack of available relevant resources, it seems that they desperately want to initiate a continued dialogue on elders' medical-psychological issues and civil-penal law, by bridging the gap between the experts from different scientific fields. Mental capacity of the elderly is a challenging field where medical and (neuro)psychological knowledge meet with legal problems and legal proceedings. Mental capacity of the elderly, not only in Greece, but also in the European Union, seems not only to be a matter of private confusion, but also, a matter for which, public policy and NGOs could, and should, unite their actions to evaluate critically the empirical evidence and incorporate it into the future legislative changes. At the same time policy and NGO leaders must commit themselves to promoting education on related disciplines (medical-psychological-legal) for the group of persons with intellectual impairment.

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[9] Giannouli V, Tsolaki M. Legal capacity of the elderly in Greece. Hellenic Journal of Nuclear Medicine. 2014; 17: 2-6.

[10] Mental Capacity Act. Code of Practice. London: TSO; 2005.

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4. American Psychological Association. Assessment of older adults with diminished capacity. A handbook for lawyers. American Bar Association Commission on Law and Aging-American Psychological Association; 2005.
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# COMMUNICATION – THE BASIC WEAPON OF THE LOCAL POLICE
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**Abstract**
*This paper aims to tap a very important subject related to intellectual and professional abilities which a civil servant, a local policeman must possess, the knowledge of communication , both verbally and in writing, that everyday reality brings in front.*
*To form these skills, he needs to master very well the fundamental theoretical concepts related to communication. In addition, a local police has to practice skills and talent through rehearsals, as well as to memorize certain types of formulas of expressions he will use. Any kind of communication starts with greeting, then you introduce yourself and it finishes in a kind of open window for the next meetings.*
*It is meritorious for the local police to know and understand the human features, the different categories of persons he comes into contact with and interrelates, as well as to know the technique to initiate, maintain and close communication.*
*The paperwork is structured on theoretical notions about communication, reverential formulas and communication with different persons of various behaviors.*

**Key words**
**Communication:**
- **Notice, information, news, report, contact, contact, relationship**.
- Transmission of information, news, and hearing and finding persons.
- Determining a person or more using language, to give up at the first thought, to adjudicate from a different angle or point of view of a situation, a case.

**Politeness:**
- **Attitude, behavior consistent with good fit, kind, polite**.
- The set of rules of behavior in good spirit, kindness and mutual respect.
- Kind, polite behavior, formal wear of the local police in dealing with third parties.

## Introduction

Local police carry out their work in the service of citizens. They can be considered as service providers and recipient is the citizen and the community. These services must be provided in a professional manner, with authority and in compliance with the law. Life requires more than ever, special attention to the shape of things, maybe more than the content.

In a world marked by change, worries and tension, community representatives, civil servants, local cops must be selected carefully, carefully trained to be able to respond to citizens ' expectations. There are two ways to influence attitudes, behaviors, suggestibility and power of persuasion. One and the most powerful is communication - which is the basic weapon of the local police. A good communication creates short link bridges that can loosen people; you can create the prerequisites for a civilized and benefactor dialogue.

## 1.Greeting and mimics

Greeting is the first sign of politeness; it is its oldest manifestation. In time it became mandatory duty towards each familiar person and, sometimes, towards strange persons.

It expresses friendship and good-will to one another and the beginning of a polite beginning. It also stands for a double honor : one, for the greeted person, and, two, for the one who greets. Greeting is completed by facial expressions and appropriate gestures. Greeting has a number of nuances that can complete its meaning in order to become a sign of respect, esteem and consideration or, on the contrary.

The greeting of the local policeman highlights his good manners and intentions, representing the source of collaboration and the citizens' support. He must not wait to be saluted but to head off greeting and to respond with good will and without exaggeration to say hello.

Mimics, very specific to human behavior, have a great power of suggestion, completing the meaning of the words. That's why words must be controlled, carefully chosen and used properly. Uncontrolled gestures lead to confusion, hilarity, disapproval giving the impression of a total disdain of people. Such examples are : rubbing the face or chin, keeping hands in pockets, scratching during the dialog or talking with cigarette in mouth.

**2.Human communication** means relationship among people and it is built
with emotions, feelings, attitudes and interests. It creates a web of relations as it is a transitional process during which meanings, ideas, energies, feelings and even goods change owners, either from one individual to another, or to a small group or to a large one. The main objective of human communication is to make the interlocutor to feel, to think or to behave in a certain way. It represents the level of creation and transmission of a message from the emitter to the receptor.
The elements of the communication process suppose:

a. The existence of at least two partners (emitter and receptor), and the relationship that occurs between them;
b. The capacity of the partners to emit and receive signals in a certain code which is familiar to both of them;
c. The existence of a message transmission channel;

Levels of communication:

a. inner communication is the relation between a person and his inner voice. The main forms of this communication are thinking, meditation, planning, memorization and dreaming.

b. communication also represents the dialog between two interlocutors in an exclusive way. It can satisfy the need of recognition, of controlling, of dominating, and of imposing one's own will, to lead or influence.

c. Group communication represents the communication among intimate friends, within a team, a family or in a small group of persons. Inside these groups knowledge or personal experiences are shared, problems are solved, tension is created or eliminated, new ideas are elaborated, important decisions are taken or invented.

d. Mass communication may occur in a great variety of forms : book, print media, audio visual facilities. The common feature of this communication is represented by the delayed, incomplete and weak answer of that who gets the message.

**Types of communication**:
1. Verbal communication (through words) is acquired through study and practice.
Its success is conditioned by the visual control existing between the speaker and the listener and the differences in perception are brought by the biological, psychological and social peculiarities (sex, age, health, memory, temperament, culture, nationality and education).
2. Non-verbal communication (symbols, signs, through presence, through the arrangement of things around us ) includes :

- sensory communication : messages are got through the senses(sight, hearing, smell, touch, taste)
- aesthetic communication : messages are sent through various artistic forms (painting, dance, music, image)
- communication by using symbols (flag, badge, distinction, decoration).

A message can be transmitted through:

a. verbal language achieved with words - 7 %;
b. non-verbal language – achieved by mimics, gestures - 55%
c. paraverbal language – is a form of the non verbal language, a vocal form represented by tone, tones of his voice, the rhythm of speech, enhancement mode in the words, pauses between words, verbal tics – 38%

The speakers behavior is also important in understanding a message. The speakers can be passive, assertive (attitude, the way of defending rights) and aggressive.

Here is an efficient guide of communication:

1. Listen attentively;
2. Speak about what the other person is interested in;
3. Avoid boring details;
4. Avoid platitude, monotony;
5. Express clearly;
6. Ask questions frankly, in an open way;
7. Prove everything in controversy;
8. Think before you interrupt;
9. Develop a tolerant attitude;
10. Be generous when you appreciate;
11. .Be flexible;
12. Trust yourself;
13. Speak loud;
14. Look into the eyes of the listener;
15. Think positive;
16. Control time;
17. Encourage feed-back and show you care;
18. Repeat the clear subjects of the message;
19. Empathize with the listener;
20. Thank for the feed-back;
21. .Smile;

3. Reverent formulas and stereotypes which must be used or avoided by the local policeman.

In the official relations of the local policeman with people in the community, aggression is very seriously and responsibly dealt with, especially in work relationship, which can be strongly influenced by this.

The Romanian people have a born sense of politeness and good behavior. Our language offers many formulas of addressing: you (singular), you (plural),and many possibilities of nuances through which we can show respect, esteem in a discreet or ceremoniously way, depending on the relations existing between the speakers.

Here are some polite ways of addressing:

1. If you would be so kind and allow me….
2. Please ,let me…
3. I kindly ask you…
4. Dear Mr. Popescu…
5. Dear Madam…
6. Distinguished ladies…
7. Distinguished gentlemen…
8. Distinguished colleagues…

9. Honored Commission…
10. Honored Mrs. directories
11. Honored Mrs. engineer
12. Honored Mrs. teacher…
13. I come to invite you…
14. I'd ask permission to suggest you …
15. Allow me to offer you…
16. Regretfully, I must …
17. I am very pleased with the given suggestions and I thank you…
18. I would kindly ask you to wait…
19. Would you be so kind…
20. Please let me…
21. Tell me, please, what can I do for you…
22. Please give us a few days to check …
23. May God speed with you…
24. I wish you speedy healing…

Verbal stereotypes are removed by :

a. non-utilization of demeaning, annoying formulas : Hey, you over there
b. avoiding phrases such as : you're not right, I contradict you, you're lying;
c. avoiding from the communication slogans without any meaning : it is necessary to draw the conclusion, we will act firmly,relentlessly, we are committed to;
d. engaging in discussions on topics they have mastered using the right words without formulas such issues, problems, tricks, calculations
e. avoid wording in jargon and slang or use set expressions which show antipathy and lead to distrust.
f. Such expressions are used by offenders, black market traders, but local policeman, even if they know the meaning, they need to avoid their use.

4. Local police behavior and manners of communication approach.

a. Initiating communication and actual communication

- It's like the tone for music;
- To be inviting and enlightening versus the topic;
- It must follow certain steps : greeting, introduction, exposing the reason;
- Benefits will be reaped from all three types of communication : verbal, non-verbal and other way of expressing (mimics, gesture);
- It will be chosen and selected words carefully, use appropriate vocabulary – interlocutor, context, legislative component, human component, repeatability, degree of social prejudice;
- The partner in the discussion will never be interrupted;
- Dialogue will not be dominating;
- It is recommended not to abuse its authoritarian prerogatives of his position, of the predictable truth;
- Human dignity, the ego of the local policeman antithetical with the interlocutor, are and should be placed on the same level;

b. The interlocutor identification:

- it relies on documents;
- is completed based on common perception, auditory, gestures, expression;
- it's the local policeman's first step in initiating communication, but it is not a decisive impact regarding the his decision
- fact-finding investigation can be made in plain sight, whenever necessary;
- the legal data-base are at his disposal;
- the study is conducted not only by the policeman, but by the citizen, too;

c. Gestures in communication

- they must not be exaggerated;
- the movements of the arms must not be too large;
- shoulder raising is excluded;
- there is no head back;
- no peeking is allowed;
- do not spin keys on the tip of the finger;
- do not signal disagreement by mimics;
- do not use hand gestures that might mean : go away; leave me alone;
- never point direction by pointing with the finger;
- do not imitate somebody else's gestures;
- do not keep your hands in pockets;

d. Facial expression in communication

- relaxed;
- distinguished;
- natural;
- not tensed;
- without jaw movements;
- without grimacing;
- it must not be fenced;
- without expressing annoyance;

We could list the following aspects of the communication, such as posture in communication, appearance of agent, communication distance, easing communication, listening in communication, end in communication, to say NO to YES in communication and so on, all outlining acceptable profile to local police.

5. The local policeman communication with different persons

a. Communication with a child:

- to be straight and sincere;
- children memorize words, promises, expressions;
- they need to be listened to;
- usually, they tell the truth;
- they can give real information;
- they are fascinated by uniform, equipment; car symbols;
- they respect and fear authorities, policemen;

THE BEGINNING OF PHILOSOPHY IS THE ANSWER AT THE CHILDREN'S QUESTIONS.

b. Communication with an old person

- old persons are, usually, eager to help;
- they respect law, order and rules;
- they need to be listened to;
- facial expression, tone, voice timber are essential;
- the appreciation of their work means an act of honor to them;

c. Communication with a female

- women are very attentive with clothing, arguments;
- they accept hard justifications;
- they are good psychologists and, usually, they can easily "read" thoughts;
- they like style, beauty and good taste;
- the local police must be very careful in behavior and speaking;
- sometimes, they do not incline toward recognition of facts;
- sometimes they can be verbally aggressive;

d. Communication with a drunken person

- requires tact, presence of mind, flair, acumen;
- usually they can be very noisy or very quite;

- they can be very brave, unthoughtful,
- they are very talkative and they know everything;
- they need to be listened to;
- a drunken person tells the truth;
- must be judged carefully;

**Conclusion**

The brief description in the above article, can be a starting point for future efforts, to train and practice in reverential addressing formulas to develop skills and automatism necessary for an effective communication. So, I consider that a good communicator is a good local policeman in present days and in future.

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# DICTIONARY UPDATED WITH TERMS RELATED TO THE LOCAL POLICE
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## Abstract

*The Local Police, who are a body in the service of society, not a "force" used in society, fulfill according to the European Code of Police Ethics three main tasks: first, to ensure compliance with the laws, secondly, to help people who are in danger or trouble and, thirdly, to help people in their relationship with other institutions or individuals.*

*We have defined the significant terms and concepts that we used throughout the paper. Secondly, we have presented the theoretical framework by using the analytical method, while also detecting the relevant items in the construction of the terms, and we have illustrated and shown the practical, applicable side of the core topics being analyzed, managing to provide a number of applications of the theoretical aspects, which bring forth the pragmatic finality of the latter.*

**Keywords: ensuring public order, good public management, improving citizen safety, maintaining public order, preventive notification, public order, local police officer, public servant, public safety, summons, contravention, restoring public order**

## Introduction

Local police agents operate in areas of public safety established at police station level through Public Order and Safety Plans, they report new developments in the operational situation, the number of inhabitants, environments and places with a risk of contraventions and criminal offences, the available manpower and means, knowledge of persons prone to commit crimes and also supplement the surveillance of those who are under the attention of police.

The action priorities set by the Public Order and Safety Plan are the main directions for focusing the efforts of the structures with responsibilities and authority in the field of public order and they are based on the following strategic objectives:

## 1. Ensuring Public Order

Ensuring public order involves "a set of specific measures, activities and actions adopted and carried out by specialized bodies of state administration, in view of the enforcement of the rules of civic conduct laid down in laws and other normative acts, of the rights and freedoms of citizens, as well as the protection of public and private property"[1].

Ensuring a climate of civic normalcy, of public order and safety has always been a priority for law enforcement and public safety bodies, which, through their specialized structures have sought to identify the most effective forms and methods of achieving this goal.

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[1] Decision No. 1040 of the 13th October 2010 through the approval of the National Security Strategy 2010-2013 published in the Official journal No. 721 of 28th October 2010, index of terms p.27

Public order is enforced in accordance with the plans for public safety maintenance drafted at the level of each community police unit and sub-unit, by using the order formations in their area of competence, the formations usually consisting of patrols.

The national system of public order enforcement is an assembly comprising the following:

• legislation;
• the forces of public order;
• training;
• leadership.

In conclusion, ensuring public order means imposing law enforcement measures, in order to prevent and deter acts aimed at causing social disturbances or violence during public gatherings and demonstrations, cultural and sports activities, as well as other similar events with large attendance. The measure of ensuring public order and safety is among the duties of the Local Police and of the Romanian Gendarmerie, which, according to Law No. 550 of 29th November 2004 on the organization and functioning of the Romanian Gendarmerie, Chapter 3, Article 19, paragraph 1, letter b, "perform the tasks of ensuring public order during meetings, marches, demonstrations, processions, picketing actions, promotional, commercial, cultural and artistic, sports, religious, commemorative events, and other such activities taking place in the public space and involving crowds of people" and, according to Law No. 155 of 12th July 2010 on the Local Police, Chapter III, Article 6, letter g: they "participate, together with other relevant authorities to ensuring public order and tranquility during meetings, marches, demonstrations, processions, picketing actions, commercial, promotional actions, cultural and artistic, sports, religious or commemorative events, as appropriate, as well as other such activities taking place in the public space and involving crowds of people".

**Good Public Management** – expresses the way of arranging things orderly, the manner in which an action, an established or imposed system of organization goes on.

**2. Improving the Safety of Citizens**

Public or citizen safety measures consist of all preventive legal actions that public institutions take in order to increase the safety level of individuals, communities and goods.

The main objectives for improving citizen safety are:

- street safety
- safety on public transport.
- road traffic safety.

The main general objectives arising from the public order and safety plan:

1. Improving the legislative framework, particularly in the field of public order, with regard to the implementation and enforcement of contravention measures.

2. Allocating resources within the public order and safety system, in order to cover the street and strengthen local police structures.

3. Strengthening the operational situation management, by:

- Carrying out public order maintenance activities in an integrated system, in order to reduce antisocial acts on means of transport, as well.
- Structuring the manner of organization of the public order forces, in order to ensure patrolling and intervention if necessary.
- Collecting data and information on the incidents, events and tasks to which the resources for maintaining, ensuring and restoring public order are allocated.
- Extending the tactical analysis system for monitoring and evaluating the operational situation, as well as planning the public order maintenance activities;
- Ensuring a climate of normalcy during the performance of activities with large attendance.

4. Increasing efficiency in the field, by enforcing and checking specific measures in certain key situations.

5. Promoting a behaviour that enhances public safety in the community, through the local police officers, in order to increase awareness and the identification of threats on the local community.

6. Developing action procedures applicable to all police officers.

7. Ensuring a climate of public safety and order in pre-university educational institutions.

8. Improving the quality of public service in the field of public order.

It is one of the most important services, given its direct impact on citizens through:

• The increase of transparency and impartiality in the delivery of public police services;

• The correct, concise and timely information of citizens with regard to the activities performed by police officers;

• The improvement of the service handling requests, petitions and notifications;

• The improvement of the work with citizens.

**Public Tranquility**

Public tranquility means “the usual, constant climate of understanding, peaceful coexistence of life in society”[2].

Public tranquility is disturbed when “this peaceful environment is removed and replaced by a state of general excitement, in which the sense of personal security is affected by fear and anxiety, in which understanding and peaceful coexistence are replaced by states of conflict, in which the healthy atmosphere that should characterize life in society is flawed”[3].

In conclusion, public tranquility is the result of compliance with all rules of conduct established either by law or by the common sense of all people, so that each of us may live in harmony with all others.

**3. Maintaining Public Order**

Maintaining public order involves “all measures, activities and actions organized and carried out daily by law enforcement and public safety bodies, for the normal functioning of state institutions, the protection and respect of citizens’ fundamental rights, the norms of civic conduct, rules of social coexistence, the other supreme values, as well as public and private property”[4].

Public order maintenance is based on the following issues arising from the principle of professionalism:

1. The capacity for information which is necessary for the development of technical and criminological situations that will allow the formulation of real predictions and the improvement of the database held by institutions with regard to objectors, the means available to them, their operating modes, as well as the area in which they operate or can operate. The

[2] Romanți Liviu-Marian, *Teorie şi practica aplicativă în legislația contravențională – partea specială (Theory and Applied Practice in Contravention Law – the Special Part*), Ed. Eurodidact (Publishing House),Cluj-Napoca, 2012, p.15

[3]Darius Stănculescu, Mirel Roman, Mihai Marin,Cătălin-George Spînu, *Note de curs, Legislație contravențională (Lecture Notes, Contravention Legislation)*, vol. II, The Special Part, Ed. C. H. Beck (Publishing House),Bucharest, 2009, p. 3

[4] Ministry of Administration and the Interior, General Directorate for the Organization and Planning of Missions and Resources – Coordinator: Chief Commissioner Adrian Romanică, *Glosar de termeni din domeniul ordinii şi siguranței publice (Glossary of Terms in the Field of Public Order and Safety)*, Ed. Ministerului Administrației şi Internelor (Publishing House of the Ministry of Administration and the Interior), Bucharest, 2006, p.169

establishment of a database will allow the anticipation of future protest actions and the rationalization of police intervention.

2. Speed of reaction when the acts of disturbers are outside the authorized range is required so that the public order maintenance formations may be organized and deployed to intervene in the shortest time limit possible. Most times, this allows the control of this allows the control of the situation and the avoidance of the chain incitement to public disorder.

3. The force of reaction takes into consideration the fact that the forces disturbing public order are becoming more and more violent and that they often resort to the use of weapons and dangerous equipment, and police forces must be able to react for their deterrence, scattering or, if needed, neutralization by force, as allowed by their logistics.

4. The control of the situation in time and space considers the fact that large-scale social protest actions may manifest over long periods of time and extend over large areas. These situations impose the need for the state to be able to employ authorized public intervention force which should be endowed with the appropriate tactics and equipment allowing an efficient and quick reaction.

5. The management of the control activity requires that the operations for ensuring and restoring public order should be organized and executed according to the established intervention plan, improvisation, inappropriateness and poor preparation being doomed to fail.

In conclusion, public order maintenance is part of the public order and safety structure which is accountable for the needs and safety of the community, through the development and implementation of operational programmes and strategies appropriate to the operational situation existing in a certain stage of social development.

The measure of maintaining public order and safety is among the duties of the Local Police and the Romanian Police according to Law No. 218 of 23rd April 2002 on the organization and functioning of the Romanian Police, Chapter III, Art. 26, para. 1, point 2: “[they] enforce measures for maintaining public order and tranquility, the safety of citizens, for preventing and combating crime and identifying and counteracting the actions of agents that pose a threat to the life, freedom, health and integrity of individuals, private and public property and other legitimate interests of the community” and, according to Law No. 155 of 12th July 2010 on the Local Police, Chapter III, Art. 6, letters a and b, “[they] maintain public order and tranquility in areas and places established through the Public Order and Safety Plan of the unit/administrative-territorial subdivision approved according to the law” and “[they] maintain public order in the vicinity of public schools, public health establishments, in car parks located on the public or private space of the unit/administrative-territorial subdivision, in commercial and recreational areas, parks, markets, cemeteries, as well as other such public places owned and/or managed by the units/territorial-administrative subdivisions or other institutions/local public services established through the Public Order and Safety Plan”.

**4. Preventive Notification** – is “the action of notifying the authorities or the population, by official notice, of a situation or decision for a prophylactic, preventive or averting purpose”[5].

Preventive notification contains personal data which are divided into two categories depending on their origin:

[5] Ministry of Administration and the Interior, General Directorate for the Organization and Planning of Missions and Resources – Coordinator: Chief Commissioner Adrian Romanică, *Glosar de termeni din domeniul ordinii şi siguranţei publice (Glossary of Terms in the Field of Public Order and Safety)*, Ed. Ministerului Administraţiei şi Internelor (Publishing House of the Ministry of Administration and the Interior), Bucharest, 2006, p.180

1. When the personal data are obtained directly from the data subject, unless that person already holds the respective information, the controller is obliged to provide at least the following information:

a) the identity of the controller and of his representative, if any;

b) the purpose of the data processing;

c) additional information, such as: the recipients or categories of recipients of the data; whether the supply of the requested information is mandatory and the consequences of the refusal to provide it; the existence of legal rights, especially the right to access, to intervention on the data and of opposition, as well as the conditions for their exercise;

d) any other information which is requested by order of the supervisory authority, taking account the specific nature of the processing.

2. When the data are not obtained directly from the data subject:

Except when the data subject already has the respective information, the controller is obliged to provide the data subject with at least the following information at the time of data collection or, if a disclosure to third parties is envisaged, no later than the time when the data are first disclosed:

a) the identity of the controller and of his representative, if any;

b) the purpose of the data processing;

c) additional information, such as: the categories of data concerned, the recipients or categories of recipients of the data, the existence of legal rights, especially the right to access, of intervention on the data and of opposition, as well as the conditions in which they may be exercised;

d) any other information which is requested by order of the supervisory authority, taking account the specific nature of the processing.

## 5. Public Order

The notion of public order was first established in the Romanian Constitution in Art. 53 point 1: "The exercise of certain rights or freedoms may be restricted only by law and only if necessary, as appropriate, for: the defence of national security, of public order, health or morals, of the rights and freedoms of citizens; conducting a preliminary criminal investigation; preventing the consequences of a natural calamity, of a disaster, or an extremely serious catastrophe". This term has also been used in the Declaration of Human Rights, Art. 29, point 2: "In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society".

Public order represents the desire of the overwhelming majority of the population in need of having their life, health, property and, last but not least, the possibility to freely express their options, protected.

According to the definition, the concept of "public order" includes activities that regard: the citizen's relationships with other members of society concerning the use of a public good, the supply of a public service, his relationships with others in order to achieve those rights and freedoms which by their nature involve a collective activity, often performed in public places, public health and hygiene, public violence limitation, ensuring the peaceful nature of public demonstrations, as well as the prohibition of certain activities.

In terms of content, public order is a synthesis of its components:

• natural order, which represents the state of equilibrium of natural and environmental factors;

• social order, which represents the peaceful coexistence and cooperation between members of society, without violating their rights and interests.

• rule of law, which represents the normal functioning of law authorities, created to ensure compliance with the law.

The concept of "public order" may be analyzed from several points of view:

• In the field of juridical sciences, public order is "a state of law and fact which allows achieving and maintaining an equilibrium based on the social consensus required for an optimal functioning of the social system as a whole in the conditions of the internal legal regulations in force, the consecration, protection and respect of the fundamental rights and freedoms of citizens, public and private property, the other supreme values in order to promote and assert social progress in a democratic society"[6].

• In the field of administrative sciences, public order is defined by:

- Its prominent material character, "in the sense of action meant to avoid visible disturbances";

- Its public character, "in the sense that the police do not only comply with internal regulations, but also respect the private domain, to the extent to which the activities carried out have an effect on the outside world".

• Its limited character, "in the sense that it relates to three aspects: tranquility (keeping order in the streets, in public places, the fight against noise), security (in the sense of safety in case of human or natural accidents, fire, floods, armed conflicts), sanitation (defending public hygiene)"[7].

In conclusion, we may say that "public order" is a state of equilibrium and tranquility that ensures a climate of civic normalcy, in compliance with legal rules and norms of civic conduct, allowing the exercise of constitutional rights and freedoms.

## 6. The Local Police Officer, as Public Servant

The term "police officers" is not understood by everyone in the same way, which is why a need was felt to set the boundaries of its meaning in several international or regional regulations. Thus, the Police Code of Conduct, which is included in the Annex to the UN General Assembly Resolution regarding the coordinates of conduct of law enforcement officials, in the comments to Art. 1, shows that this term includes all officers of law, whether appointed or elected, who exercise police powers, especially the powers of arrest and detention and, in countries where police powers are exercised by military authorities, whether uniformed or not, or by state security forces, the definition of "police officer" shall be regarded as including officers of such services[8].

The local police officer is a public servant having the competence to enforce law at local, county or national level. The rules laid down in the Statute of Public Servants apply to the public servants of the Local Police, whereas labour law regulations apply to the contractual staff.

A public servant "is a person appointed to public office. Public office represents all duties and responsibilities established by the public authority or institution, under the law, in order to achieve its powers"[9]. Public office means "a complex set of powers, duties, responsibilities and attributions set out within a public service in order to satisfy continuously and rhythmically the general interests of society"[10].

In the doctrine and the jurisprudence, the concept of public servant has been addressed by different branches of law as having several meanings:

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[6] Drăghici Ion, *Conceptul de ordine publică şi reflectarea lui în legislaţia actuală (The Concept of Public Order and Its Reflection in the Current Legislation),*Bucharest, 2007, p. 2

[7] Verginia Vedinaş, *Drept administrativ, Ediţia a V-a revăzută şi adăugită (Administrative Law. Fifth Edition Revised and Enlarged),* Ed. Universul Juridic (Publishing House), Bucharest, 2009, p. 11

[8] Code of Conduct for Law Enforcement Officials, adopted by Resolution no. 34/69 of 17th December 1979 of the UN General Assembly

[9] Law No. 188/1999 on the Statute of Public Servants, Chapter I, Art. 2, points 1-2.

[10] P. Negulescu,*Tratat de drept internaţional (Treatise of International Law)*, 4th edition, Editura Mârvan (Publishing House), Bucharest, 1934, p.531

• In the Romanian criminal law, a public servant is any person who exercises, permanently or temporarily, in any form, no matter how he/she was invested, a task of any kind, remunerated or not, in the service of a unit.

• In the administrative law, a public servant is the individual who holds a state office or is vested with a certain state office, held legally.

In conclusion, the local police officer is a public servant with a specific status operating "in the interest of the local community, solely on the basis of and in order to enforce law, as well as the acts of the deliberative authority and the executive one of the local public administration, and also in accordance with the specific regulations of each activity field, set by administrative documents of the local and central public administration authorities"[11].

**7. Public Safety (Public Security)**

The meaning of the term "public safety" is "to express the sense of tranquility and trust that the security and protection service gives rise to by enforcing the measures aimed at maintaining public order and tranquility, the safety of persons, communities and goods, as well as achieving the partnership civil society – order bodies in order to address community issues, the defence of the rights, freedoms and legal interests of citizens"[12].

The state of public order and safety is achieved by general economic, social and political measures, as well as special measures, mainly of a preventive nature. With all these measures, we are witnessing a "maintenance of the vulnerability of citizen safety, a perpetuation of crime and development of organized crime, although the capacity of state institutions to respond to specific risks and threats has increased"[13].

If examined from the point of view of police practice, the duties in the field of public safety may be grouped into the following categories:

- *The protection of state security,* the state being the supreme organization form of the community. Taking into account the prevailing importance of state security protection, the national security legislation grants major powers to a special branch of the police, having the special mission of watching over the security of the state. From an organizational point of view, the framework of these powers naturally includes the surveillance of political and social movements, public meetings, various associations and organizations, etc...

- *The protection of individual security* may be divided from a practical point of view into the following groups:

a. Protection of the person delivered into the custody of the police.

b. Protection against dangers caused by natural disasters or calamities, by fire, floods, earthquakes, etc., in which case, in addition to police bodies, firefighting services and, if necessary, bodies of other competent administrative services are called to work together with the army to prevent losses and save people's lives and property.

- *The protection of material goods* includes real estate security against damage caused by wrongdoers or negligence, ensured concurrently by police bodies, own security force, military security, specialized security companies, civic security in communes and villages.

**8. Summons** is a police measure consisting of an order to execute or cease an action being carried out, in order to:

a) disrupt the beginning of committing an illegal act;

b) interrupt ongoing antisocial acts;

c) interrupt acts of disturbance of public order;

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[11] Law No. 155 of 12th July 2010 on the Local Police, Art. 2, point 1, letters a and b.

[12] http://www.politiaromana.ro

[13] Mateaș Florian, *Note de curs-Politie Locală I ((Lecture Notes – The Local Police I)*, Agora University, Law and Economics Faculty, year 2013

d) put an end to such acts or detain suspects;

e) eliminate manifestations of resistance from individuals, as well as disarm aggressive and turbulent elements;

f) flush out people from hiding places;

g) prevent the escape, entry or withdrawal without right of persons to or from certain objectives, clearly defined perimeters”[14].

The number of summons and their contents are determined by legal provisions, the number and behaviour of the individuals, as well as the deed committed, the execution stage, the time the police officer has at his disposal, and also the measure to be taken after the summons.

Tactical rules to be observed when summoning people:

a) perform the summons in a loud voice, in short words, uttered forcefully, in an authoritative tone, from a suitable distance away from the person summoned, which should guarantee your security;

b) follow the two stages of the summons:

- The first stage of the summons is preventive in nature, you ask the person to perform a certain action, while also presenting the authority on whose behalf the summons is made: “THIS IS THE POLICE! FREEZE!”, “STOP! THIS IS THE POLICE!”.

- The second stage consists in repeating the request to the person summoned to perform a certain action, also presenting the police officer’s action in case of disobedience (“STOP OR I’LL SHOOT!”; “SCATTER! WE WILL USE…”);

c) allow a short interval of time between the stages of the summons, in order to observe the reaction of the person summoned and to leave enough time for him/her to execute your instructions, you should only make the transition to the next stage and the intervention itself only in case of disobedience;

d) constantly watch and observe the person summoned, so that you can predict his/her movements and intervene if necessary;

e) if you assume that the person summoned is carrying weapons, summon from a place where you are protected;

f) when operating at night and lighting of the suspect person or the surroundings is needed, for security purposes, the light source should be kept away from the body, so that it is not an indication of your position;

g) if the person summoned has ceased action, approach him/her with caution and proceed, as appropriate, to immobilize him/her or perform other police measures;

h) if two or more police officers take part in the action, operate in different directions: the one in charge of protection should ensure lighting from a shelter that would ensure his/her protection and the other should intervene in view of summoning and immobilizing the suspect; under no circumstances should the police officers act in opposite directions.

**9. Contravention.** This concept is defined as: “the act committed with guilt, established and sanctioned by law, ordinance, Government decision or, where appropriate, by decision of the local council of the commune, town, municipality or sector of Bucharest, the county council or the General Council of Bucharest Municipality”.

The term “contravention” has three meanings in contravention law (two meanings are abstract and one is concrete):

[14]Arad Police – Coordinator: Police Chief Commissioner Ioan Roșca, Police Commissioner Pavel Hălmăgean, *Manualul polițistului de ordine publică (Manual of the Public Order Police Officer)*, Ed. Concordia (Publishing House), Arad, 2007, p.18

- In its abstract sense, it "may be seen in relation to other forms of illegal acts or to distinguish different types of contravention illegal acts from each other"[15];

- In its strict sense, it "is an offence provided (described) by contravention law, these rules are based on the assumption that the act prohibited might be committed again, being a kind of hypothetical illegal act"[16];

- In its concrete sense, contravention "is an act of a person, committed with guilt, which violates a rule that forbids it, classifying it as a contravention, defined as a behaviour taking place in the surrounding world"[17].

From a legal point of view, contravention is a juridical fact, a type of inconvenient activity because it harms and jeopardizes the rights and interests of society or of individuals.

From a social point of view, contravention is an act which causes a harm to a subject of law or endangers social order.

From a natural point of view, contravention appears as a deviation of conduct of a member of society, who is disrespectful to the other constituents of the group to which he/she belongs.

From a moral perspective, contravention appears as an activity contrary to the minimum ethical conscience of society.

## 10. Restoring public order

Restoring public order involves "all legal measures, mainly repressive, based on coercion, including the use of physical force and firearms, enforced by the bodies with statutory powers to restore the situation created by a serious breach of public order, which endangers the security of the state, citizens, public and private property, to a state of normalcy"[18].

Public order restoration includes a set of specific actions organized and executed in due time, depending on the situation, which is based on the use of the technical means and equipment provided, aimed at restoring the situation to a state of normalcy.

Public order restoration is based on the following principles:

• The principle of legality – the actions of the forces of public order and safety are in the spirit and in compliance with the laws and citizens, in the exercise of their constitutional rights and freedoms, are subject only to such limitations as determined by the law and natural moral requirements.

• The principle of territoriality and mobility of forces – public order and safety forces are organized at central and territorial level, with structures and powers suitable for the disposition and organization of administrative-territorial units and the development of the crime phenomenon.

• The principle of prevention of acts of public order disturbance reflects the ability of the management bodies and law enforcement forces to take in due time the necessary measures in order to avoid any acts or facts which might affect public order, to prevent their amplification and degeneration into violent acts or actions that seriously affect public order.

• The principle of operability and interoperability reflects the ability and availability of law enforcement forces to perform actions within the national space, to cooperate with similar

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[15] Mihai Adrian Hotca, *Regimul juridic al contravenţiilor. Comentarii şi explicaţii. Ediţia 5 (The Legal Regime of Contraventions. Comments and Explanations. Fifth Edition)*, Editura C.H.Beck (Publishing House), Bucharest, 2012, p.16

[16] M.A.Hotca, *op.cit*., p.16

[17] M.A.Hotca, *op.cit*., p.17

[18] Ministry of Administration and the Interior, General Directorate for the Organization and Planning of Missions and Resources – Coordinator: Chief Commissioner Adrian Romanică, *Glosar de termeni din domeniul ordinii şi siguranţei publice (Glossary of Terms in the Field of Public Order and Safety)*, Ed. Ministerului Administraţiei şi Internelor (Publishing House of the Ministry of Administration and the Interior), Bucharest, 2006, p.231

forces from other states and perform specific tasks for maintaining peace and removing the effects of disasters, as part of international bodies, on the territory of other states.

• The principle of non-discrimination requires law enforcement and public safety forces to adopt a correct, impartial and non-discriminatory conduct, without distinction of race, sex, religion, nationality, political affiliation, property or social origin, towards all citizens.

• The principle of avoidance of surprise implies an obligation of the decision makers in the field of public order and safety to warn and summon with regard to the use of the equipment provided, especially firearms, and, where appropriate, grant the time necessary for the people involved to cease their actions and/or leave the area.

• The principle of sufficiency, graduality and proportionality involves the use of force proportionally with the type and degree of public order disturbance, only to the extent strictly necessary and for a limited period of time, sufficient to achieve the desired objective. The procedures and means of action involving coercive measures will be used progressively and only if absolutely necessary.

• The principle of permanent collaboration with the community. In performing their duties, law enforcement forces ground their whole activity on the wide support of citizens and act with respect for the public.

• The principle of the inviolability of the person establishes that any person has the right to respect for their life, physical and moral integrity, as well as the inseparable attributes of their personality. This principle includes the prohibition of torture or ill-treatment, as well as the person's right to a fair and correct trial, before a competent, independent and impartial law court.

• The principle of specialized intervention and cooperation. The use of the main and supporting, complementary and exceptional law enforcement and public safety forces place in maintaining and restoring public order takes place in relation to the legal powers, the training and equipment specific to each category of forces.

• The principle of unitary management, structural and relational optimization, harmonization and synchronization of actions in order to achieve the goals intended, with minimal effort and best results.

The structure of public order and safety consists of:

1. main forces;
2. supporting forces;
3. complementary forces;
4. exceptional forces.

In conclusion, the measure of restoring public order and safety is among the responsibilities of the Romanian Gendarmerie according to Law No. 550 of 29th November 2004 on the organization and functioning of the Romanian Gendarmerie, Chapter 3, Art. 19, para. 1 letter c: "to execute missions for restoring public order when it has been disturbed by any actions or acts which contravene existing laws".

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# MATRIMONIAL CONVENTION

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**Abstract:** *The current paper aims to contribute to enriching the knowledge of the judicial instrument by which the spouses choose one of the matrimonial regimes acknowledged by the Romanian Civil Code. In this research context, we wish to describe aspects regarding the definition of this judicial notion, the necessary formal conditions to be met in order for it to be valid and the effects it produces.*

**Key words:** *matrimonial convention, matrimonial regime, preciput clause*

## Introduction

*The principle of the free matrimonial conventions stated by the present Romanian Civil Code*[1] *grants each couple the possibility*[2] *to choose one of the matrimonial regimes acknowledged by law, the legal community regime, the conventional community regime or the separation of goods regime.*

*This regulation was highly appreciated by doctrine for being susceptible to the current needs of modern society and for realigning our law with the European systems of law*[3]*. Although the Family Code*[4] *has eliminated the possibility of conventionally establishing the patrimonial relations between spouses, this sort of regulation existed in Romanian law, as the matrimonial convention was, at some point, called "a marriage convention" and was regulated in the Caragea Law, the Calimach Code and the Civil Code of 1864.*[5]*.*

## Doctrine references regarding the legal appearance of the matrimonial convention.

### The notion of "matrimonial convention"

The matrimonial convention is also known as a "prenuptial agreement", "matrimonial contract", "dowry paper", "dowry formation", "marriage contract"[6].

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[1] Law no 287/2009, republished in the Official Bulletin no 505/15.07.2011, with changes and subsequent additions

[2] Speciality literature unanimously ackowledges that this is a choice and not an obligation of sposues to conclude such a convention; in case there is no convention, the matrimonial regime will be that of joint ownership; thus we can state that the parties are obliged to conclude such a convention when they choose a different matimonial regime (see Al. Bacaci, Viorica –Claudia Dumitrache, Cristina Codruța Hageanu, *Family law. 7th edition. The regulation of the new Civil Code.,* C.H. Beck Publishing House, Bucharest, 2012, p.77; Marieta Avram, *Civil law. Family*, Hamangiu Publishing House, 2013, p.177, Cristina Mihaela Nicolescu-*Comment of article in The new Civil Code. Articles 1-2664*, supervisors Fl. A. Baias, E. Chelaru, R. Constantinovici, I. Macovei, C.H. Beck Publishing House, 2012, p.349)

[3] For the importance of unifying the matrimonial regimes on an European level, see I. L. Vlad, The publicity of the matrimonial convention in UN member states in „Romanian Judicial Opinions" no.7/2013, p.108-148

[4] Law no 4/1953 republished in „The Romanian Official Bulletin" no 13/18.04.1956, cuurently rescinded by Law no 71/2011 for the coming into force of Law no 287/2009 regarding the Civil Code

[5] For the analysis of the origin and evolution of the matrimonial convention, see Cristina Mihaela Nicolescu, The historical evolution of matrimonial regimes. Special overview on the origin and evolution of matrimonial conventions, Bucharest University, Law, no 1/2009, p.37-69

[6] D. Lupașcu, *The matrimonial convention* in "Romanian Judicial Opinions" no.7/2013, p.35

The law maker did not provide a legal definition of this judicial notion and only indicated, in article 329 (named "Matrimonial Convention") of the Civil Code that "choosing another matrimonial regime than that of the legal community is achieved by the conclusion of a matrimonial convention". Thus, legal doctrine[7] had the mission to create a legal definition of this concept. We list below some of the definitions created by specialty doctrine:

- "the judicial document through which future spouses or spouses, by using the freedoms granted to them by the law maker, establish their own matrimonial regime or modify the matrimonial regime which is to be applied to them"[8];
- „a public, solemn judicial act of conventional nature through which the future spouses regulate, before the conclusion of marriage, the patrimonial relations which will exist between them throughout the marriage or the convention concluded during marriage through which the spouses decide to change the current matrimonial regime with another type of matrimonial regime acknowledged by law"[9];
- "the document through which the future spouses establish the matrimonial regime which will apply throughout their marriage"[10];
- „the legal document through which the future spouses establish their own matrimonial regime or modify their current matrimonial regime or the regime they had at the time of marriage"[11].

**The legal nature and the judicial characteristics of the matrimonial convention**

We can draw the following conclusions regarding the juridical nature and the characteristics of this convention from the definitions listed below. Thus, the matrimonial convention is a legal act with the following judicial characteristics[12]:

- *it is, by its own essence, a bilateral judicial act*, concluded between the spouses or future spouses, but it does not exclude the participation of third parties (in case of donations, for example);
- *it is a complex judicial act, which can involve multiple judicial acts (*in can include acknowledgement of a child, for example);
- *it is a solemn judicial act,* as it must have a certain form in order to be valid;
- *it is a reciprocal judicial act*;
- *it is an accessory to the institution of marriage,* thus meaning it only produces effects during marriage;
- *it is subject to all publicity formalities;*
- *it is, as a principle, incompatible with common law regime,* although it is accepted as an exception the situation in which the parties agree to change their matrimonial regime after a certain amount of time passes;
- *it is an intuitu personae judicial act*.

Also, the definitions listed above express the *object of the matrimonial convention,* that being the choice made by the spouses for one of the matrimonial regimes stated by law. We must also mention the fact that freedom of the parties is limited, as we must distinguish between the general limits (the imperative provisions of the law must be respected as well as morality) and the special limits stated in article 332 of the Civil Code:

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[7] It was suggested to remove any interpretation regarding the nature of this convention as it was legally defined - D. Lupașcu, *Op. Cit*., p.37

[8] D. Lupașcu, Cristiana Mihaela Crăciunescu, *Family Law. Second edition*, Judicial Universe Publishing House, Bucharest, 2012, p.139

[9] Adriana-Florentina Dobre, Conventions and matrimonial regimes in the new Civil Code in Law no 3/2010, p.13-14

[10] Marieta Avram, *Op. Cit*., p.177

[11] Emese Florian, *Family Law. 4th edition*, „ C.H. Beck Publishing House, Bucharest, 2011, p.86

[12] As stated by author D. Lupașcu, in mentioned paper, p.38

"(1) The matrimonial convention can not waiver from the legal provisions regarding the matrimonial regime except in certain cases stated by law, as the sanction is annulment.
(2) Also, the matrimonial convention can not impair the equality between spouses, parental authority or the legal matters of inheritance"

By interpreting the legal provisions quoted above, it is obvious that the parties can't create a *sui generis* regime by combining rules of different matrimonial regimes or by their own will[13]. Also, the parties' autonomous will in this matter is limited by the imperative regulations regarding the parental duties and obligations, as it is clearly stated that the parents must exercise parental authority together. The matrimonial convention can't place the obligation to provide for the child on one parent alone. Thus, the rules of inheritance can't be overlooked by matrimonial convention, as it is impossible to change the legal order of heirs or the quote of each heir.[14].

**Conditions and formalities for the validity of the matrimonial convention**

**General conditions for validity**

As shown before, the matrimonial convention is a contract, thus it must respect certain conditions. First of all, the *general conditions for validity* of each contract - certain conditions regarding the capacity to become part of a contract, the legal expressing of consent, a legal object of contract and some formal conditions. As this is a very specific matter, that which regulates the patrimonial relations between spouses, the Romanian Civil Code states a series of special conditions to be met in order to conclude this convention in a legal manner. We will describe each and every one of these conditions as follows.

*The capacity to enter into a matrimonial convention:* the person who has the legal capacity to enter into marriage also has the legal ability to enter a matrimonial convention. In Romanian law, matrimonial capacity is acquired at the age of 18 according to the provisions of article 272 of the Civil Code; as an exception, the minor of 16 years of age can enter into marriage by meeting all the conditions stated in article 272 second alignment of the Civil Code[15]. As a result, the minor of 14 or 15 years of age can't legally enter into a matrimonial convention or marriage as he or she is not of age at the moment of entering the convention[16].

In regard to matrimonial conventions concluded by minors, we will study the provisions of article 337 of the Civil Code: "(1) The minor who is of matrimonial age can enter into a matrimonial convention of modify such a convention only with consent from his legal guardian or the tutelage authority.

(2) When missing the agreement stated above, the convention concluded by the minor can be annulled under the provisions of article 46 which are to be applied in this matter.

(3) The action for the annulment can only be formulated after a year has passed since the conclusion of marriage".

Article 337 second alignment of the Civil Code expressly states the relative invalidity for the lack of consent from the legal guardian or the tutelage authority when concluding the matrimonial convention by the minor. Thus, the matrimonial convention can be annulled under the provisions of article 46 of the Civil Code which are the following:
"(1) The people with the legal ability to enter a contract can't oppose the inability to legally enter a contract to the minor.
(2) The action for the annulment can be exercised by the legal representative or the minor of at least 14 years of age, as well as its legal guardian"

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[13] Al. Bacaci, Viorica –Claudia Dumitrache, Cristina Codruța Hageanu, *Op. Cit*., p.81
[14] Cristina Mihaela Nicolescu-Comment of article *329* in *Op. Cit.,* p.352
[15] For more details see Titus Prescure, Roxana Matefi, Civil Law. General part. The people. Hamangiu Publishing House, Bucharest, 2012, p. 82.
[16]Cristina Mihaela Nicolescu-*Comment of article 337* in *Op. Cit.*, p.359

(3) When the convention was concluded without authorization from the tutelage authority, necessary according to the law, the prosecutor will be called upon to exercise the action for annulment".

In case one or both spouses were placed under judicial prohibition, the conclusion or modification of the matrimonial convention is made by their legal representative.[17].

*The parties' consent*: An essential condition for the valid conclusion of the matrimonial convention is the personal and simultaneous consent of the future spouses, unlike the judicial act of marriage which always implies personal consent from future spouses; the lawmaker has stated, as an exception, that this convention can be concluded through a proxy and the power of attorney given to the proxy must be "authentic, special and with a predetermined content", according to the provisions of article 330 first alignment of the Civil Code.

Also, consent must be serious, free and expressed knowingly (article 1204 of the Civil Code), not to be given while in error or given under the threat of violence (article 1206 first alignment of the Civil Code). However, there are opinions expressed by Romanian doctrine[18], opinions which we agree with, according to which, as this is a patrimonial act, the vice of lesion can be applied; such a conclusion is drawn from the fact that lesion is also applied when concluding contracts between people of age.

*The matrimonial convention's cause*: As the foundation of matrimonial convention is marriage, the effects of such a convention are strictly connected to the institution of marriage[19]. At the same time, the matrimonial convention's cause can imply the will of the spouses to modify the matrimonial regime to be applied.[20].

Judicial doctrine[21] discussed the problem of the illegal cause of the matrimonial convention concluded during marriage in order to enter another marriage in the near future. It was appreciated that such a contract concluded between married people in order to take effect in a future marriage would be void as the cause of the convention is illegal.

*Validity of the matrimonial convention:* Article 330 first alignment of the Civil Code states that the conclusion of the matrimonial convention must be made through a document authenticated by the public notary. Such a provision offers "the certainty that the parties understood the meaning and the effect of the act they are concluding"[22] and they know the future possibilities of patrimonial development[23].

In regard to the quoted provisions, the problem of whether people who get married aboard can authenticate their matrimonial convention at the embassy was raised. Although there are divergent opinions, following the changed made by Law no 36/1995[24], it was clearly stated, in article 18 second alignment, letter b), that it is the embassy's duty to authenticate these documents, except for all judicial documents concluded between living persons which buy or sell property and documents regarding the choice, change and liquidation of the matrimonial regime.

**Particular aspects regarding the matrimonial convention**

Special conditions which rule the regime of matrimonial convention refer to the *area of subjects of such a convention, the effects of such a convention in time (*what is the precise moment when this convention can be concluded and the specific date to which it can produce effects), *the limits of the disposition right.*

[17] D. Lupașcu, *Op. Cit*., p.39
[18] see, M. Avram, *Op. Cit*., p.183
[19] Gabriela Cristina Frențiu, *Op. Cit*., p.179
[20] D. Lupașcu, *Op. Cit*., p.41
[21] For a newer perspectiv on this matter see G.C. Frențiu, *Op. Cit*., p.183
[22] Adriana-Florentina Dobre, *Op. Cit*., p.16
[23] I.L. Vlad, *Op. Cit*., p.123
[24] Republished in the Official Bulletin no 444/18.06.2014

In regard to the *people who can enter such conventions*, this is limited to people who have a certain quality to one another, either husband and wife of two people of opposite sex who meet the legal conditions of age and the capacity to legally enter marriage and have expressed their intention to get married[25].

In regard to the *time of conclusion and the time the convention produces effects* we will take into consideration the provisions of article 330 second and third alignment of the Civil Code:

"(2) The matrimonial convention concluded before marriage produces effects only from the date of the marriage.

(3) The convention concluded during marriage produces effects from the date stated by the parties or from the date it was concluded". Thus, we understand that a matrimonial convention can be concluded even before the marriage occurs as it is clear that, being an accessory to marriage, the convention can only produce effects since the time of marriage. Certainly, for some of its provisions (like that of acknowledgement of a child), these can produce effects from a moment previous to marriage, that being the date of conclusion of the matrimonial convention[26].

In regard to the *specific object of these conventions*, these regulate the patrimonial relations between spouses, those certain rights and obligations which can be evaluated in money as the spouses will decide the regime of any goods they purchase during marriage (exclusive property, joint property or common property)[27], while respecting the *limits of the disposition rights* mentioned above.

**Specific clauses of the matrimonial convention. Special overview of the preciput clause**

According to the provisions of article 333 first alignment of the Civil Code "by matrimonial convention it can be stipulated that the surviving husband can take over, without payment, before the legal inheritance procedures, one or more of the commonly owned goods. The preciput clause can be stipulated to benefit either spouses or just one of them".

In regard to the judicial nature of this clause, we must keep in mind the fact that it is concluded *mortis causa,* as it has a liberality character[28], being seen as a matrimonial advantage of the surviving husband, being somewhat similar to the partition of goods. As it is part of the matrimonial convention, judicial doctrine notes that the faith of the preciput clause depends on the faith of the main convention[29].

As the preciput clause will be further discussed, for now we will point out the judicial regime of this clause as stated by article 333 alignments 2-5 of the Civil Code:

"(2) The preciput clause is not subjected to donations report, but only to reduction under the provisions of article 1.096 alignments (1) and (2)[30].

(3) The preciput clause does not interfere with the right of common creditors to pursue the goods subject of this clause, even before the joint goods regime ceases.

(4) The preciput clause becomes void when community ceases during the lifetime of spouses, when the beneficiary husband dies before the other spouse or when they both die at the same time or when the goods are sold to common creditors.

(5) The execution of the preciput clause is done in nature or, if this is not possible, by an equivalent".

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[25] Adriana-Florentina Dobre, *Op. Cit*., p.14

[26] Cristina Mihaela Nicolescu-Comment of article 330 in *Op. Cit.,* p.350

[27] Adriana-Florentina Dobre, *Op. Cit*., p.17

[28] T. Bodoașcă, Aurelia Drăghici, *Discussion about the preciput clause in the regulation of the new Romanian Civil Code* in „The Law" no.10/2013, p.33

[29] D. Lupașcu, *Op. Cit*., p.40

[30] „(1) Dispositions of the will are considered before donations. (2) The dispositions of the will are to be fulfiiled all at once except if the author of the will stated that some will be fulfifiled with priority".

**Ensuring the opposability of the matrimonial convention**

In order for it to be opposable to third parties, Romanian law (article 334 of the Civil Code) establishes some **forms meant to ensure the publicity of the matrimonial convention**[31]:

- the mention made by the registry office on the marriage license (article 334 second alignment of the Civil Code - "after the legalization of the matrimonial convention or after receiving a copy of the marriage license, the public notary sends a copy of the matrimonial convention to the registry office in order for it to be mentioned on the marriage license");
- the inscription in the National Notary Registry of matrimonial regimes (article 334 first alignment of the Civil Code);
- the inscription in the cadastral register, the register of companies or other publicity registers stated by law (article 334 fourth alignment of the Civil Code - "keeping in mind the nature of the goods, as the matrimonial conventions will be noted in the cadastral register, the register of companies as well as other publicity registers stated by law; in all these cases, failing to comply with all the publicity formalities can not be covered by the inscription made in the register mentioned in the first alignment").

As a result of reading article 334 of the Civil Code, specialty literature[32] mentions two categories or formalities regarding the publicity of the matrimonial convention: *general formalities* (mentioning the matrimonial convention on the marriage license, inscription in the National Notary Registry of matrimonial regimes) and *special formalities* (specific to certain categories of professionals - inscription in the register of companies and, for certain goods, inscription in the cadastral register).

We must also mention that, according to article 334 fifth alignment of the Civil Code anyone who proves interest can inquire the National Notary Registry of matrimonial regimes and can ask copies of some documents as third parties are interested to know the length of powers husbands have over their goods or the length of mortgage in case we are discussing a creditor of one of the spouses or even of both of them[33].

It is also useful to keep in mind that failure of the notary to meet his obligations can attract his material responsibility to the spouses or third parties if the lack of publicity has caused any damage to them[34]. Of the same importance is the right of each spouse to ask for the formalities to be fulfilled (article 334 third alignment of the Civil Code).

If the publicity formalities were not met, we are in the presence of the **inopposability of the matrimonial convention** in agreement with article 335 of the Civil Code:

„(1) The matrimonial convention can't be opposed to third parties in regard to the acts concluded with one of the spouses unless the publicity formalities stated in article 334 were met or in case third parties had knowledge from another source.

(2) Also, matrimonial convention can't be opposed to third parties in regard to the acts they conclude with any of the spouses before marriage".

**Effects of the matrimonial convention**

We are about to distinguish, as does the doctrine, between:

- *effects produced between parties (spouses or future spouses) and*
- *effects in relation to third parties.*

**The effects of matrimonial convention between parties**

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[31] As centralized by speciality literature -D. Lupaşcu, *Op. Cit*., p.42

[32] M. Avram, *Op. Cit*., p.192

[33] Al. Bacaci, Viorica–Claudia Dumitrache, Cristina Codruţa Hageanu, *Op. Cit*., p.86

[34] *idem*

It is a known fact that the specific effect of the matrimonial convention is the configuration of the patrimonial relations between spouses according to the matrimonial regime they choose. Subsequently, we must consider the probation effects as this convention will be used as proof of the matrimonial regime the spouses choose. At the same time, as we have examined before, the effects of the matrimonial convention, regardless of the moment it was concluded, come into force at the date of marriage.

The matrimonial convention ceases to produce effects:

- from the date when another matrimonial convention is concluded, as it is a known fact that the matrimonial regime chosen by the spouses is not definitive, it can be changed by respecting the conditions stated by law for the conclusion of another matrimonial convention (article 336 of the Civil Code);
- as a result of becoming void;
  - when the parties concluded the convention before marriage and did not conclude the marriage;
  - when the tutelage authority decided to change the joint matrimonial regime to separately owned goods;
  - the marriage is void or was annulled (except for putative marriage).
- in case the *matrimonial convention is void or annulled*[35], the regime of legal community between spouses is applied, without impairing the rights acquired by third parties of goodwill (article 338 of the Civil Code)

**The effects of matrimonial convention in relations with third parties**

After having analyzed the *inopposability of the matrimonial convention to third* parties, we will now analyze the issue of *simulating a matrimonial convention* regulated by article 331 of the Civil Code as follows: „The secret act, by which another matrimonial regime is chosen or the current matrimonial regime is changed produces effects only between spouses and can not be opposed to goodwill third parties".

The quoted text is completed by the general provisions of simulation, thus it is legitimate to state that third parties have the right to choose between rejecting the effects of the secret civil act when it prejudices their rights or to invoke the same act in their favor when the effects of the act benefit them. This choice can be exercised within the action for declaring the simulation[36]. We must also mention that while simulation has three forms: fiction, disguise and the interposition of people, in case of matrimonial convention simulation has only two forms, fiction and disguise, as the matrimonial convention has an *intuitu personae* character which means that only spouses can become parties to this act[37].

As the doctrine pointed out[38], by assuming some judicial solutions, the secret act is valid even if it is not authenticated, although the law requires an ad validitatem form, if the public act is concluded in the necessary form.

**Conclusions**

At first sight, matrimonial convention or the prenuptial contract seems to be a tool for families with a certain financial position. In time, we believe that these modern provisions embraced by the Romanian law maker, will prove to be useful, as they will be capitalized by every couple according to their specific needs.

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[35] Causes for the absolute annullment of the matrimonial convention are: lack of consent, derogatory clauses from the chosen matrimonial regime, clauses which impair the equality between spouses, parental authority or legal inheritance procedures, not respecting the necessary form stated by law, conclusion of the convention by a minor under the age of 16; relative annullment clauses: consent affected by vices or violence, concluding the convention without legal authorization.

[36] Gabriela Cristina Frențiu, *Op. Cit.*, p.188

[37] *idem*, p.185

[38] For details, F.A. Baias, Doctrine study and jurisprudence. Rosetti Publishing House, Bucharest, 2003., p.58

From the facts stated in this study, we can safely say that by regulating this type of convention, the lawmaker was preoccupied with ensuring an equilibrium between the interests of both the parties and the third parties, as it has established certain regulations regarding the conditions to be met in order for this act to be valid, rules regarding both the publicity formalities and the opposability to third parties.

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# THE NIGERIA 1999 ECONOMIC POLICY AND OBJECTIVE: AN UNFULFILLED MISSION OF EXPECTATION

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**Abstract**

The 1999 Constitution of Nigeria contains beautiful provisions for economic policy and objective under chapter two of the country's fundamental objectives and direct principles of the state policy. And by section 16 of the said Constitution, the economic objectives of the state are well spelt out that if followed to the letters, Nigeria would have been a paradise on earth and a country to be recognized as a developed nation. But alas, the operators of the Constitution have woefully failed in this direction. Thus the majority of the people in Nigeria are left to wallow in despicable hunger, unemployment, poor living condition and lack of many indices of social and welfare developmental services.

The condition is so bad that unless all these unpalatable and monumental factors are well addressed, the country may sooner or later reach its waterloo of extinction.

## Introduction

The people of the Federal Republic of Nigeria have made a Constitution in 1999 for the purpose of promoting the good government and welfare of all persons in their country on the principles of freedom, equality and justice, and for the purpose of consolidating unity among themselves.

It must be noted however that CHAPTER II of the said Constitution deals with the FUNDAMENTAL OBJECTIVES AND DIRECTIVE PRINCIPLES OF STATE POLILCY, while section 16 of it deals essentially with the economic objectives of the state.

The provisions in section 16 may be stated essentially in a nutshell as follows:

1. That the state should control the resources of the Nation in such a way as to promote national prosperity for every citizen on the basis of social justice and equality of status and opportunity.
2. That the state should control the national economy in such manner as to secure the maximum welfare, freedom and happiness of every citizen on the basis of social justice and equality of status and opportunity.

The state should protect the right of every citizen to engage in any economic activities outside the major sectors of the economy.

3. Lastly it is provided that the state shall direct its policy towards ensuring

(a) The promotion of a planned and balanced economy.

(b) That the material resources of the nation are harnessed and distributed as best as possible to serve the common good.

(c) That the economic system is not operated in such a manner as to permit the concentration of wealth or the means of production and exchange on the hands of few individuals or a group; and

(d) That suitable and adequate shelter, suitable and adequate food, reasonable national minimum living wage, old care and pensions, and unemployment, sick benefits and welfare of the disabled are provided for all citizens.

As laudable as these provisions are, it must be observed that over the successive years, Nigeria has been contending herself with how to achieve these beneficial objectives which have become a pye in the sky or a sciciphean task to achieve.

One may in fact pontificate that Nigeria is a failed state; and it remains so since year 2012 to date as one of the world's failed states because the country is weak, heavily corrupt with inefficient governmental control, lack of visionary leaders with integrity, insecurity of an unyielding proportion, which has made sustainable development impossible, greed, nepotism and favouritism with confrontational attitude to both the rule of law and due process, high handedness with a serious blow to the administration of justice. In fact nothing has worked very well in Nigeria to give economic democratization or emancipation and happiness of the generality of its people a chance. Millions of its people are jobless and many are living in abject poverty without any hope for the future.

Thus there is no economic democratization to deal with the empowerment and elevation of the people to perform and transform the economy.

All these failures are indices of bad government and they glaringly show that political democratization and economic democratization are off course and strange bed fellows in Nigeria, whereas they are to be necessary co-adjutors and indeed complimentary to each other. These defects have become the albatross and touch stone of our underdevelopment in Nigeria which is the talking point of this paper and why the economic objectives have become a farce and an unfulfilled mission of expectation.

**An Over view of corruption**

As I have written somewhere else[1] the issue of corruption has the most serious implication on good governance and sustainable development in Nigeria.

Corruption is a dreadful phenomenon which destroys the fabrics of all governmental structures in a nation. It is a canker-worm, an anathema, and a gall and worm wood entity which should be abhorred by any nation that wants progress and development. But in Nigeria, the insatiable appetite for corruption has become an endemic disease which has brought concomitant sufferings, untold economic dilapidation, unrest, poverty and lack of infrastructural facilities and underdevelopment to the people so much that the dividends of democracy are not earned and the country's economic objectives have become an illusion.

The corruption has weakened all democratic processes in the Local, State and Federal Levels of government in Nigeria. It has dampened morality, weakened meritocracy, and produced an avalanche of misrule, selfishness, ineffectiveness, colossal misappropriations of funds and unwillingness of those who were elected into governmental powers to quit their offices as at when due. It must be noted that since democracy and corruption are strange bed-fellows hence Nigerians are living in a world of grinding poverty where infrastructural facilities are nil, but accumulation of wealth by those people at the helm of affairs abound; bribery for budget approval and acts of embezzlement are predominant so much that one may be worried about the future of the country unless something positively backed up with functional and punitive laws are put in place.

According to Ahmed El-Rufai (2011)[2], "the endemic nature of corruption in Nigeria has led to the loss of US 380 billion between independence and 1999. A global financial integrity initiative report dated January 2011 estimated the U.S. $130 billion worth of illicit financial flows occurred between 2000 to 2008. Adding all these numbers to the loss of nearly 87 billion to the fuel subsidy racket alone brings our national loss due to corruption to something in the region of US $000 billion from independence to end of 2011". However, Oyewo (2011)[3] remarked that corruption is more under the military than the civilian regimes in Nigeria as follows:

During Buhari's regime which took place between 1983-1985, corruption was intense so much that his "diversification of the economic policy became a mere dream, while the "essential raw materials within a targeted period" which he promised were yet to descend from heaven ."Also the labour intensive project and job opportunities he promised were a

mere broadcast, while his policy of rephrasing development projects involving large foreign exchange commitment was a mere fallacy, and the upholding of the principle of public accountability was a facial exhibition. The regime was so corrupt without a definite policy, it was dilly-dallying, tottering and perambulating until he was swept off the podium of power.

Gowon's government was also too corrupt. Cases of corruption perpetrated by the governors and cabinet members under him were too alarming, yet he wanted to stay put in power.

In Abacha's regime which took place between 1993-1998, corruption pervaded the entire Nigerian scene, the economy became totally crumbled, unhappiness enveloped the entire nation, while looting and arson became the order of the day. Abacha amassed wealth for himself, family and associates with downright abuse of powers and corruption while he invented machineries for the killing of people who were opposed to his further stay in office.

The story of corruption is long and depressing so much that Nigeria has been ranked among the three most corrupt nations in the world with adverse consequences on both economic and political development of the country. Corruption has eroded governmental legitimacy of Nigeria and it is a terrible blow on development of any kind.

Unless there is an integrated National assault on this hydra headed monster called corruption, Nigeria may sooner or later with accelerated speed reach its waterloo of extinction. It is therefore the talking point of this paper that unless good government are put in place the realization of the 1999 Economic Objectives will be a mirage.

## Corruption, Government and Economic Objectives

Corruption has become endemic in Nigeria and since 1999 to date, it has now reached a level of cacophonic crescendo which has made the realization of her economic objectives a farce. Corruption so far appears like an inheritance of dubious value from one government to the other in Nigeria, whereby each successive government gets itself really involved in it with new machineries, gadgets and techniques to outwit its predecessor in the shoddy and nefarious act. The resultant effect of the scenario has produced a bad government which is insensitive to the plights of the common man.

Thus money that would have been used to improve socio-economic factors like water, housing, good living conditions, employment and the payment of pensions have been dangerously diverted, plundered and looted to satisfy few individuals, their privies and cronies.

It is the belief of this paper that a good government provides and pursues vigorously security, basic necessity of life, sound political and social policies which are necessary for sustainable development of its country. Thus socio-economic policy and objectives which impoverish the people through corruption in Nigeria cannot be seen to be coming from a good government.

## Leadership traits and politicians

With all these written above, it then means that if we should do away with corruption completely, then Nigeria would need democratic and visionary leaders who know that political sovereignty is but a mockery without the means of meeting poverty, unemployment, illiteracy bad housing, diseases and so on.

Thus we need such leaders who believe that the happiness of a society is the end of government.

How then can our economic policy and objectives succeed in Nigeria when millions of our people are wallowing in streams of poverty, lack of care, and poor living conditions without employment? Many of our leaders in Nigeria fail to grasp the very essence of government which consists in a strong belief that offices are public trusts that are bestowed for the good of the country and not for the benefits of themselves as such. Thus, they must shun and stop the ugly ambition of amassing wealth to themselves and their cronies at the expense of the down trodden masses who have been deprived of the basic amenities of life to make a living.

And how can the control of the National economy in such a manner as to promote the welfare, freedom and happiness of every citizen on the basis of social justice and equality of status and opportunity materialize in Nigeria, when there are acts of inequality between those in power as against the millions of the masses who are really suffering in silence?

No wonder why Patrick Wilmot has concluded that Nigeria has been a failure since nothing works from health, education, manufacturing, telephones, roads and many more to mention a few.

That is why Nzeogwu in January 1966 said –

*"Our enemies are the political profiteers, swindlers, the men in high and low places who seek bribes and demand ten percent, those that seek to keep the country divided permanently so that they can remain in office as ministers and VIP's of waste, the tribalists, the nepotists".*

Achebe also blamed the problems of Nigeria on the failure of effective leaders as follows –

*"The trouble with Nigeria is simply and equally a failure of leadership. There is nothing basically wrong with the Nigerians land or climate or water or anything else. The Nigerian problem is the unwillingness or inability of its leaders to rise to the responsibility; to the challenges of personal example which are the hall marks of true leadership".*

One may argue that the prevailing disparity between the few "Haves" and billions of "Have-nots" may sooner or later promote conflicts between the duo which may escalate to insecurity – since an hungry man is an angry man.

Nwoke puts it right when he said as follows –

*"Inequality is a potential threat to the national security, that is to the stability and continued existence of Nigeria as a Nation. This is because the prevalence of poverty, ignorance, disease and so on among the masses in Nigeria is a fertile ground for the spontaneous eruption of violence among the masses; a violence which can be triggered off by even a minor problem. A hungry man, they say is an angry man, A poor angry people in fact can also be incited to acts of disaffection and rebellion by external or internal forces".*

All the above show in clear terms that our leaders must be people oriented and put into practice all the provisions of the economic objectives as enshrined into the 1999 Constitution for the happiness of the people and sustainable development in Nigeria.

Our political leaders must therefore shun primitive accumulation of wealth to themselves, privies and cranies.

They must be law abiding and shun actions that may be translated as being partisan and evil deeds. They must look themselves as Caesar's wife who is above suspicion.

For instance, a situation credited to the President by Hon. Tambuwal in the paper titled the Nation of Tuesday, 10 December 2013, and that of Dapo Thomas of the same paper "on Sunday 8 December 2013 looks very disturbing. According to Tambuwal, Jonathan anti-graft fight is weak. He alleged that the President body language was promoting corruption adding that the administration has not addressed high-profile corruption cases in the country.

He buttressed his allegation with such cases like the subsidy probe, the pension, the SEC bribe and the bullet-proof car cases.

He noted that after the House of Representative has done a diligent job by probing and exposing the culprits, you now see something else when it comes to prosecution. And instead of allowing the EFCC to be in control and prosecute the offender, Mr. President would set up another committee to duplicate a job which has already been done by the parliament.

Thus sacred cows will be protected against the provisions of the law.

He concluded that the government has no business setting up any administrative committee in such cases that are clear to all Nigerians.

In his own writing Dapo Thomas queried as follows:

*"With the audacious and brazen looting going on in Jonathan administration why should the citizens who are the victims of the misery created by the extra-ordinary corruption in government not protect or be at war with Jonathan".*

Dapo pointed out that at the 1st Nigerian Economic Summit in year 2012, Dr. Ngozi Okonjo-Iweala disclosed that some oil marketers fraudulently collected ₦232 billion from the Federal Government as fuel subsidy yet cases of those who paid fraudulently and those who received fraudulently are yet sitting on the fences.

Many charges have been leveled against Jonathan administration by Dapo Thomas as follows:-

1. The Chairman, Nigerian Governor's Forum Rotimi Amaechi in November 16, 2013 at Sokoto urged the EFCC to investigate how $5billion got missing from the Federal Government Excess Crude oil Account. According to him the ECA stood at $9 billion by January only to shrink to $4billion by November, 2013.

2. A Minister was the subject of a petition sent to EFCC by a group called crusaders for Good Governance in August 13, 2013. In the petition the Minister was accused of having spent close to N 2billion on chartered jets. Yet nothing was heard about what the government has done over it.

3. The Aviation Minister Stella Oduah was accused of spending N 258 million on just two cars. Her case was moving up and down from one committee/panel to the other and it took the President a very long time and perhaps reluctantly to get her off the job.

However, it must be pointed out that in civilized countries once a Minister is alleged like Oduah he or she resigns immediately, but in Nigeria the situation is different.

4. One John Yusuf, a director in the Police pension office or so was sent to jail for 2 years only for stealing ₦27.2 billion belonging to innocent police pensioners. It was also alleged that Yusuf went for plea bargaining, that is he negotiated settlement terms with the government.

Please note that the concrete manifestation of this write up is twofold to wit:

Firstly to show that we have sufficient financial capital if properly managed to pursue the much desired economic objectives as contained in the 1999 Constitution of Nigeria if our leaders would show sufficient uprightness, integrity and probity in office without acts of corruption. Secondly for all politicians and the entire citizens to wake up from their slumber and ensure that our conscious efforts are geared towards the redressing of all these distressing and depressing impediment situations of our national economy and good government.

**Re: Economic Objectives: Public and Private Sectors**

It has been asserted by many writers that the pace of economic growth and development of any Nation or Country is usually dictated by the aggregate effect of the activities of both the public and private sectors.

That is why Nigeria practicing a mix economy enshrines in the 1999 Constitutional provisions dealing with its Economic Objectives and thus permitting any person to participate in areas of the economy within the major sector.

And that is why in the same section 16, protections are made for the rights of every citizen to engage in any Economic activities outside the major sectors of the Economy.

By section 16(3) of the said Constitution, a body is enjoined to be set up by an Act of the National Assembly which shall have power

(a) To review, from time to time, the ownership and control of business enterprises operating in Nigeria and make recommendations to the President; and

(b) To administer any law for the regulation of the ownership and control of such enterprises.

Section 16(4) deals with the interpretation of certain words where (b) "Economic activities" includes activities directly concerned with the production, distribution and exchange of wealth or of goods and services; and

(c) "Participate" includes the rendering of services and supplying of goods.

From all the provisions narrated above, it is crystal clear that successful manipulation of any country in Economic objectives is a function of the participation of both the citizens (private sector) and the government (public sector).

We shall deal more comprehensively with the PUBLIC and PRIVATE Sectors of the economy later on in this work.

**The Concept of Public and Private Sectors**

The National Institute for policy and strategic studies (NIPSS) had these to say on the above

Sectors and Nigerian Economic Crisis: "The public sector refers to a combination of central" "government institutions, local authorities, nationalized industries and public corporations." "It refers, in short to the entire gamut of the state's institutional operation in a given" "economy. Contra wise, the private sector constitutes that part of the economy which is" "not within the purview of the state's control or involvement".

Apart from the productive activities of private enterprises, the private sectors also embraces the economic activities of non-profit making organizations as well.

It is a pity that time and space will not permit us to discuss in this paper all institutions within the purview of both the public and private sectors but we are of the opinion that writing later on them generally may be desirable to show their weaknesses and strength since they all have common problems. However as at this juncture, it will therefore be necessary to discuss firstly the common phenomenon that triggered off crisis in Nigeria economy over the years.

**Nigeria Economic Crisis**

Nigeria is an agricultural country and in 1960's Nigeria was predominantly an exporter of agricultural commodities but came 1970's, the oil exportation became the main stay of the economy. Oil prices became profitable and alluring as a result of the favourable world oil prices by the OPEC during the 1973 middle-East War.

As at this period the country became very rich, buoyant and healthy. There was money to cater for the building of roads, the provision of health care services, the building of schools and for employment opportunity of the masses.

Everything went on well in Nigeria, and poverty as it is today became unknown.

Nigeria became so rich that money was not her problem but how to spend it. Like a short- sighted man, Nigeria thought that all these conditions would go on for ever and thus concentrated on oil exportation to the neglect of all other products.

Thus because of the oil bonanza, there has been a serious neglect of the agricultural sector which led Nigeria to be importer of food stuffs like rice, wheat and so on to mention a few.

Nigeria forgot at this time that all that glitters are not gold, and that life is not always a bed of roses. There is no permanency of existence in life which is subject to chopping and changes of circumstances; and instead of diversification of its economic products and return to sustainable agricultural practices; it stood firmly in life and death only with the oil exportation.

This structural distortion has affected the economy of Nigeria because the Nigerian economy could not absorb the shocks which were triggered off by the sudden collapse of oil market which started by the middle of 1981.

The NIPSS informed us that the dramatic fall in domestic oil production coupled with the even more dramatic fall in world price of oil, led to a drastic reduction of Government revenues and foreign exchange earnings.

This has stampeded the entire country along the path of unemployment, hyper-inflation, and closure of industries, stagnation and indeed social unrest with even political instability.

Quoting Aboyade by 1985 the country's GPD was some 15 percent lower than at the beginning of the 1980's and the real per capital GPD and consumptions were even well below 1970 level.

The paper ended up to say that from the Economic Stabilization Act of 1982 which was advanced as an Adjustment package by the civilian administration, to the Structural Adjustment programme under the Armed forces, the Government of Nigeria has continually grappled with the policy of choices which can steer the economy away from the path of collapse and towards one of self-reliant development and social progress.

However the Nigerian government struggled hard to rephrase the economy by getting itself involved in the ownership and management of enterprises in such key sectors as banking, insurance and industry through the promulgation of the Nigerian Enterprises Promotion Decree of 1972. And by1980 there were about 70 Federal parastatals and numerous others at the state level. What however is disappointing in the whole scene is that most of the parastatals have continued to be bedeviled by corruption, mismanagement, non-profitability and political manipulation so much that they have come to constitute a drain on the increasingly meager government revenue.

Perhaps it may be pertinent to revisit the Public and private sectors in order to know why the public sector has fallen below belt and thereafter make recommendation.

**Private and public sectors revisited**

The Economic objectives as contained in the 1999 constitution allows both the state and individual citizen to manage or participate in the economy of Nigeria.

And while the state is to manage and operate the major sector of the economy only, provisions, are made to protect the right of every citizen to engage in any economic activities which are outside the domain of the major sector.

However there is a preponderant or avalanche of evidence to show that the Nigeria workforce is not giving its maximum to the Nation; and that despite the activities of the Federal Government to combat mass unemployment and to promote self-employment and self-reliance by creating the National Directorate of Employment since 30/1/1987, the rate of unemployment has reached a cacophonic dimension which is both incredible, fantastic and astronomical in Nigeria. Millions of our graduates and many youths are jobless without any hope for now or in the anticipated future. This unemployment situation usually leads to the non-payment of any minimum wage, poverty, frustration, anger, youth restiveness, and penury; which may also trigger on to stealing, unwholesome behavior, discontentment, violent conflicts and insecurity. Thus, the much expected maximum welfare, freedom and happiness of the citizens becomes an uphill task.

For now, it would appear as if the fulfillment of the much taunted economic objectives provision is not only a wishful thinking but an illusion.

To make the economic objectives realizable therefore in this perspective, we should urge the public sector to improve by embarking on an extensive and drive which will result both in the highest rate of growth and standard of living in Nigeria.

Although in terms of effectiveness and efficiency, the private sector is alleged generally to be operating better than the public sector and General Nwachukwu gave the following reasons for such a pitfall: in his own words –

(a) **Measurability:** Productivity is more easily measurable in the private sector, particularly in the productive units, than in the public sector which is usually service-oriented. It is easier to determine performance when it is quantitative rather than qualitative.

(b) **Size:** The public sector is a huge machine in terms of authority and responsibilities. It operates in very big units which are more difficult to manage than the private sector which is broken down into smaller manageable divisions.

(c) **Degree of Autonomy**: It is generally believed that the greatest strength of management in the private sector is the speed with which decisions are taken, communicated and implemented. This is not the case in the public sector, bureaucracy and red-tapism should be de-emphasized. Opportunities should be created for the implementation of constructive ideas from the lower echelon of the service. Public enterprises should be encouraged to be constructive and developmental in their administration rather than adopt rigid rules which give no room for flexibility. Parastatals need to be autonomous. It is in this regard that the Federal Government has granted most of the agencies functioning under various Ministries, some degree of autonomy to make for efficiency and effectiveness in the performance of their duties. Perhaps there is a case for more/ complete autonomy for government parastatals thus removing the strangle hold of bureaucracy in order to facilitate quick and efficient implementation of decisions.

(d) **Absence of Competition**: Basically, the public service by its nature, it is not a competitive enterprise. It grinds slowly but surely. However in a developing economy like ours speed and competitiveness are of essence. Fortunately, competition is gradually creeping into our public sector. For example, the courier services in the private sector are a challenge to the Nigerian Postal Services. Also the private airlines are competing seriously with Nigeria Airways. Allowing the public sector to be faced with these kinds of competition is a very healthy factor for improved performance and hence improved productivity.

(e) **Profit Motive**: This is generally absent in the public sector. Hence the laxity in the performance of the public sector whose wages and benefits are not necessarily determined by the amount of profit made by the organization. This factor to some extent has influenced the attitude of the Nigerian public servant who believes that whatever his performance, he would get his pay at the end of the month. One invariably finds a lack of incentive or motive in a situation where one does not look forward to some increased benefit due to increased profit-margin. However, lack of profit-motive should not be the public sector excuse for not improving performance.

**Economic Objectives and the Niger Delta people**

The oil and mineral resources upon which Nigeria government depends mainly for her economy comes from the Niger Delta area of the country, but it would appear as if the Federal Government has not been all that successful to properly harness the resources of this area in order to promote National prosperity, or efficient, dynamic and self-reliant economy for the people of the area over the years.

As a matter of fact it must be noted that the production of oil, distribution and exchange of wealth or goods in the area has been the exclusive reserves of the Federal Government under the joint venture operation with the multinational companies to the exclusion of the oil producing communities.

The 1999 constitution also has compounded the problem by vesting the control and ownership of oil mineral resources found below the land of individuals or communities on the Federal Government despite the common law provisions.

The implication is that rents, bonuses and royalties are usually being paid to the Federal Government at the expense of the true owners of the land.

To worsen the position, the payment of compensation to the people whose lands have been compulsorily acquired for oil prospecting activities in the area leaves very much to be desired.

The people thus feel cheated and alienated from their country, Nigeria.

They sometimes fund it hard to buy food and other necessary components to exist.

There is no equitable dealing with the people of this area and neither has the question of inequality and social justice been met adequately.

Consequently, as far back as 1980s frustration, unhappiness, abject poverty, improverishness, environmental degradation and many more have been the lot of the people in this area.

There is in fact a loud cry of poverty in the Niger delta area. One hears it in the agony of the jobless, the weariness of the old and the failings of the young.

And unless the Federal government takes an holistic view in solving the recurring problems prevalent in the area, the much welcome economic objectives contained in the 1999 constitution may be an illusion for the building of an envisaged just society which is both indivisible and indissoluble.

The Federal Government should adhere to the words of Abraham Lincoln who said as follows:

*" The legitimate object of government is to do for a community of people whatever they need to have done but cannot do at all, or cannot so well do for themselves in their separate and individual capacity".*

And although the Federal government has set up from one time to the other the followings:

Niger Delta Development Board (NDDB) in 1959, Oil Mineral Producing Area Development Commission (OMPADEC) 1992 – 1999 and Niger Delta Development Commission, (NDDC) 2000 to date.

These agencies, appear to be ineffective and that was why the establishment of Delta State Oil Producing Areas Development Commission (DESOPADEC) has been established in year 2007 by the Federal Government to address the problems of the oil producing communities in line with its economic objectives which are contained in section 16(2)(a)(b) and (c) of the 1999 constitution as follows:

(2) – the state shall direct its policy towards ensuring –

(a) the promotion of a planned economic development;

(b) that the material resources of the nation are harnessed and distributed as best as possible to serve the common goal,

© that the economic system is not operated in such a manner as to permit the concentration of wealth as the means of production and exchange in the hands of few individual or of a group.

"So far, the economic objectives of Nigeria are generally unfulfilled mission of expectation and particularly when the plight of the Niger Delta people are considered. Damfebo, K. reported as follows:

"The people's lives are being terrorised daily by the movement of earth shaking "explosive, heavy duty equipment and vessels."

"The sources of water are polluted, water fronts constantly being corroded; fishing gears and farming foods destroyed.

"While the entire environment is endangered and the people are exposed to avoidable diseases".

With all these, one may conclude that suitable and adequate shelter, suitable and adequate food, reasonable national minimum living wage, old age care and pensions, and unemployment, sick benefits and welfare of the disabled which are the hall mark of the country's economic objectives by section 16 (2)(d) have eluded people in this area very predominantly.

It is therefore our hope that the body set up to review from time to time, the ownership and control of business enterprises operating in Nigeria will be bold enough to make recommendations to the President in order to effect changes which will impact positively on the lives of the people particularly in this area.

**Inequality of Opportunities and welfare Services**

By section 16 (1)(b) of the Nigeria constitution it is provided that the state should control the National Economy in such a manner as to secure the maximum welfare, freedom

and happiness of every citizen on the basis of social justice and equality of status and opportunity.

This provision although is salutary and grandiose, yet it looks like a complete illusion in application since Nigeria is a country where in-equality of opportunities prevails.

It is not a welfare state where a government for instance provides money, free medical care, housing, and good living conditions to its people including (those that are not employed) or old to work. It is a place for the survival of the fittest, where everybody is on his own to look for means to exist. As a matter of fact, it is a place where millions of naira belonging to the pensioners are sometimes stolen with impunity through administrative swindling.

How can the welfare of the people be sustained when the government looks insensitive to their needs and plights.

The disparity between the "Haves" and the millions of "Have Nots" is predominant and worrisome which usually leads to the commission of nefarious acts like, stealing, with such horrendous acts like robbery, assassination and so on.

With all these mishaps, one is in doubt if Nigeria really practices Democracy in the actual sense, since democracy in its simplest form is a system that ensures a minimum of a welfare state which guarantees a living condition, food, accommodation, clothing, education for the children and municipal services which Nigeria lacks as at present. It is when the citizens are well taken care of, properly empowered and provided with all amenities to improve their living condition that one may talk of democracy.

It is hereby suggested that the Government should therefore take care of its citizens properly in order to achieve the golden objectives that are contained in the constitution.

Also if we are to reap the dividends of democracy and pursue to the letters the economic objectives, the management and operation of the major sector of the economy should be handled by people who are transparently honest and hot by the buffoons and mindless plunders of the treasury.

The management and operation should in fact be handled by those who believe that political sovereignty is but a mockery without the means of meeting poverty, literacy and disease.

Therefore a situation where an agency of the government looks like a haven for corruption and inefficiency calls for a serious rebuke in this country.

Take the case of NNPC at the risk of repetition and criticism.

The Nation paper of the 10th February 2014 is much explanatory on this.

The NNPC is alleged of stealing $20 billion of oil money which is a serious breach of the anti-anti-graft legislation and international obligations including the U.N. convention against corruption and the African Union convention on preventing and combating corruption both of Nigeria government has ratified.

Sanusi, the then governor of the central Bank alleged that the NNPC is operating a racket through which the Federation has been losing billions of dollars.

He explained that the NNPC is yet to account for $20 billion (equivalent of N3.25 trillion) from the total of $67 billion oil sales receipts from January 2012 to July 2013.

It is suggested that stealing of this money/sum from the economy of Ngieria that is already weakened by corruption will jeopardize sustainable development and hurt ordinaryNigerians who rely on the government to provide basic necessities of life such as water, good roads and electricity.

This nefarious act does not augur well for a country who has such beautiful economic objectives, and it is no less than a brazen lootery of the treasury when particularly the NNPC is said to be without power to spend any money without appropriation.

The Economic Objectives of the state has failed woefully for a failure to control the National Economy well in this circumstance and in such manner as to secure the maximum

welfare, freedom and happiness of every citizen on the basis of social justice, and equality of status and opportunities.

At least the alleged stolen and or unaccounted for amount, would have been used to cater for the realization of the economic objectives.

Finally to be noted is that it is absurd to do this particularly when our oil is sold for $30 above the bench mark price while the foreign reserves and the excess crude oil account are going down.

It is therefore suggested that if the laudable economic objectives would be properly achieved, Nigerians must imbibe the idea that government (apart from many other factors) consists that politicians should take offices as public trusts that are bestowed on them for the good of the country and not for the benefit of an individual or party. They should shun corruption and greed in order to cater for the masses; while our government should realize according to John Ruskin that the first duty of a state is to see that every child born therein should be well housed, clothed, fed and educated till it attains years of discretion;; while a good government in its entire ramification should endeavour to provide good housing, employment, water, comfort and happiness for its entire citizenry.

According to Obasanjo[8] “the state enterprises should not be poorly run, since they give way to and exacerbate corruption in our economies.

“Therefore qualitative and quantitative resource management within the framework of a mixed economy which possesses in-built and autonomous mechanism for equity, empowerment and capacity building in which access to the system is open, free and equal should be encouraged”.

Thus it is hereby opined that although the 1999 constitution contains laudable provisions on economic objectives, yet it is enjoined that we should not love it in words alone, and neither love it by the tongue, but we should love it in deed by action realizing the fact that science without religion is lame, while religion without science is blind.

**Economic Objectives and provision of welfare services**

By the Constitution of Nigeria under the Economic Objectives, it is provided that the State shall direct its policy towards ensuring that suitable and adequate shelter, suitable and adequate food, reasonable National Minimum living wage, old age care and pensions, and unemployment, sick benefits and welfare of the disabled are provided for all citizens.

Again as laudable as these objectives are, it is a matter for regret that they have not been properly achieved in Nigeria.

Thus extreme poverty remains an alarming problem in Nigeria despite its bright provisional economic objectives, including the efforts of the Federal Government.

This poverty has been caused probably by the harmful economic system of the country and the inability to impact positively on the lives of its people by the Federal Government coupled with an unequal income distribution. As remarked earlier, there is in fact loud cries of poverty in the entire country which one hears in the agony of the jobless, the weariness of the old people and the failings of the youth who often find it hard to buy food.

In addition to this, the rate of unemployment has risen to an intolerable height of discontentment, unhappiness and disillusionment; while housing facilities/projects which started in the Shagari era had been abandoned on political grounds. There is nothing like old age cares as one may find in developed countries or welfare states.

Every citizen is left on his own to struggle for existence.

The plights of the common man are many and worrisome. Not many hospitals are built with the resultant concrete manifestation of diseases and deaths.

There is darkness everywhere owing to epileptic supply of electricity. No appreciable improvement is to improve both the social and economic conditions of the people, while roads are like death traps on majority of routes in Nigeria. There is insecurity here, there and yonder which often destroys the stability of sound political and social policies.

It would even appear as if private initiatives which are the frontiers of development are not properly encouraged while there is a blow to agricultural development in the rural areas.

All these and many more have constituted themselves as impediments to the realization of the Nigerian economic objectives.

Lastly, one may write more on the spate of insecurity in Nigeria which has prevented to a considerable extent foreigners to do business with us.

However this insecurity may be associated with poverty, hunger illiteracy, corruption, unemployment, lack of good economic conditions, inherent inequalities in the society and lack of visionary and effective leaders. Although government is doing its best to prevent the spate of insecurity yet no permanent or effective solution has been reached notwithstanding the fact that no society can experience its economic objectives and development when insecurity prevails and where mob rule has become predominant.

Therefore the government must evolve certain policies and strategies to ease the problem of poverty, illiteracy unemployment, and corruption.

The government should also make it a life imprisonment or death penalty for anybody who is found guilty of corruption which has hitherto corroded and destroyed all democratic mantles and processes in Nigeria and thus culminated to unrealisation of its economic objectives.

**Conclusion**

This work has shown that Nigeria has beautiful economic objective which has not been achieved owning to many factors discussed herein.

Government has not been able so far to improve the living standard of its people owing to poverty, unemployment, lack of good housing facilities, corruption, lack of cares for old age, insecurity and malfunctioning system of pension payment. This work therefore recommends, as follows:-

1. Since inequality is a potential threat to the National security, the government should try as much as possible to move towards the direction of a welfare state which makes adequate provisions for alleviating poverty at all levels and which is our economic primary objective.
2. In order to promote government and welfare of all persons as envisaged by its economic objective, the government must make chapter II of principles of state policy justice able – like South-African Constitution. This will allow any person to sue the government when there is any possible breach of this CHAPTER.
3. We implore our leaders to follow the footsteps of Nelson Mandela as enjoined by Asiwaju Tinubu as follows:

"Mandela was an African leader who never coveted power but used power for the good of the greater number of the people. Mandela left a legacy of quality leadership, selfless service, and a people centred government"

4. Our leaders must realize that as long as poverty, poor living conditions, illiteracy, injustice and gross inequality persists in Nigeria, none of us can truly rest, and insecurity will be a hard nut to crack, or a despicable disaster to overcome or eradicate..

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# INCAPACITY OF PARTIES AND INVALIDITY OF ARBITRATION AGREEMENT AS GROUNDS FOR REFUSING RECOGNITION AND ENFORCEMENT IN KUWAIT

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## Abstract

*Arbitration agreement is one of the widely discussed laws of contract in law. Each and every country has specific rules and regulation which government had rules which govern the arbitration contract between the citizens and between the nation and other nations. Kuwait is one of such countries and it has faces a lot of challenges what it comes to arbitration law and sharia law until the time when New York Convention was incorporated and ratified in the process of administering justice in the Kuwait. The enforcement of the awards specifically has brought challenges until the NYC provided the grounds under which the enforcement of the awards may be rejected. The main objective of this paper is to discuss whether Incapacity of Parties and Invalidity of Arbitration Agreement as sufficient Grounds for Refusing Recognition and Enforcement in Kuwait. The paper is divided into five sections with first section giving introduction and definition of what is arbitration, the second part discusses the finality of the awards, thirdly it discuses the finality of the awards, fourthly the paper discuses the rejection of enforcement due to invalidity and incapacity and lastly the paper discusses the position of NYC position on the sufficiency of invalidity and incapacity as enough proof for non-enforcement and recognition of arbitration agreement as a result of invalidity and incapacity be for concludes with conclusion.*

## Keywords: Incapacity of Parties and Invalidity of Arbitration Agreement

## Introduction

*Arbitration is one of the many means of finding conflict resolution out of court. It is similar to reconciliation but more formal than reconciliation[1]. The different between arbitration and reconciliation also exist in the process through which they pass since arbitration does not give room for continuous collective bargaining and negations while reconciliation gives room for that[2].*

There are several types of Arbitration. They include;

I. Arbitration based on the international laws
II. Arbitration based on the national laws
III. Jurisdictional arbitration
IV. Arbitration between two conflicting parties

Most arbitration formation and their validity are determined by the principles of Lex

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[1] (2005)Barraclough, A., and Waincymer, J., *Mandatory Rules of Law In International Commercial Arbitration*, MELB.J.Int'l L. 6 at 210-211

[2] (2011)Al-Nowaser, K., *A legal review on the principle of "The contract is the law of contractors"*, Aleqt.com, at http://www.aleqt.com/2011/11/06/article_596219.html (last accessed on Feb 28th 2014)

contractus (property law) of the arbitration contract agreement[3]. In the year 2000, the commercial Arbitration center of the Kuwait was set up and the Kuwait parliament ratified it in the same year with many treaties of bilateral trade within the Middle East and all over the world, the treaties in them give room for settlement through arbitration process concerning disputes which arises as a result of those treaties[4]. The Kuwait laws which are governing arbitration agreement mainly apply to procedures for domestic arbitration and also concerning the enforcement of foreign awards. Under the arbitration law of Kuwait, parties of arbitration process may decide to determine the rules they are going to use in the arbitration proceeding concerning them[5]. The clause model reads,

*"Any dispute whatsoever which may arise out of this contract, its execution or its cancellation is to be referred to arbitration in accordance with the conditions stipulated in the Reconciliation and Arbitration System of the Kuwait Chamber of Commerce and Industry[6]".*

The main body or center for arbitration in Kuwait is the Commercial Arbitration Center of the Kuwait Chamber of commerce and Industry (KCAC) and expert from different professional bodies and societies also help in arbitration process[7]. There are also rules which are governing optional arbitration in Kuwait and they are mainly contained in the code of Civil and Commercial Procedures (CCCP). It was promulgated by law 38 of 1980 and later amended in 2002 by law 36 in article 173 to 188 of Kuwait by law[8].

## Finality of the Awards

In most Arabs countries and Saudi Arabia, Article 19 of the arbitration code do allows the parties to the contract to challenge arbitration award within 15 days of the decision and this is contrary to the post modernism arbitration rules. International bodies have a clear principle which does not allow the arbitration decisions to be appealable more so on the basis of their substance but give alternatives grounds under which they can be appealed[9]. These grounds are procedural in nature.

In Kuwait, the law allows the parties to freely negotiate and if appropriate include the option of arbitration to their own terms and condition[10]. The length of time taken to set up a tribunal usually depends on the agreement of the parties involve[11]. Arbitration award can be appealed in court and be nullified, they include;

I. In case there is lack of a valid agreement between the parties
II. In situations where there is procedural irregularities
III. In situations where arbitral tribunal instituted exceeded in given Authority and mandate
IV. The subject matter under contention is beyond arbitration settlement.

Kuwait government ratified the New York Arbitration Act of 1996

Section 103 of the 1996 Act on arbitration gives room and provides recognition of enforcement of New York convention award shall not be refused except on certain specific

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[3](2011) Gandhi, P., *Delhi High Court: The public policy ground for resisting enforcement of foreign awards must be interpreted narrowly*, Arbitration.practicallaw.com,

[4]( 2006)Komninos, A., *Recent Development in International Arbitration Around The World,* 2 White and Case Int'l Newsletter 19 at 5-6

[5] (2001)Park, *Arbitration of International Contract Disputes*, supra note 64, at 1787

[6] (1986) Nicholas Ulmer, *Drafting the International Arbitration Clause*, 20 Int'l Law 1335, at 1342-43

[7] (1990) *International Standard Elec. Corp. v. Bridas Sociedad Anonima Petrolera Industrial y Comercial*, 745 F. Supp. 172, 176-78 (S.D.N.Y. 1990

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[9](1994) Roy, K., *The New York Convention and Saudi Arabia: Can a Country Use the Public Policy Defence to Refuse Enforcement of Non-Domestic Arbitral Awards,* Fordham International Law Journal 18 at 921

[10](1980) Kuwaiti Arbitration Code

[11] (1980)Kuwaiti Arbitration Code

grounds which are listed in subsection 103(2-4).[12] Section 103 subsection 2 of the Act provides that *"Recognition and enforcement of the arbitration award may refused in case the person against whom that award is given proves any of the following"*

I. That one party of arbitration agreement was under some incapacity

II. That the arbitration agreement was not valid under the Kuwait law in which the decision was made

The New York arbitration Act recognizes that incase a party to an arbitration agreement was duly presented or incapacity in any manner, under sub article 7 of the Act, then that is sufficient ground for not enforcing the agreement[13].

There are circumstances under which appeals on the grounds of merits are also accepted, though this is quite different in Kuwait which also uses Sheria law as well where the ground of the challenges are based on the procedural flawlessness and the appeals on the merits are accepted only if both the parties involved expressly do so before the occurrence of the case[14].

The best known case on this is the *Emaar case of 2009* the grievances board reversed an award which had been issued in favor of Emaar one of the Dubai based company against the Saudi company known as Jawadel International[15]. In there decision, the competent court had to review their decision based on the substance of conflict[16].

**Rejection of Award under incapacity and invalidity**

The New York agreements states that lack of capacity to submit to arbitration constitutes invalidity of an arbitration agreement hence sufficient grounds for lack of enforcement. It is generally accepted in Kuwait and under the convention that the willingness of two or more parties who have no capacity or are not legally entitled to have obligations has no legal effect[17]. Capacity is one of essentials of any legal agreement and arbitration agreements are not exceptional to these rules and rules and regulations hence such agreements are void. The invalidity of the arbitration agreement due to incapacity and lack of enforcement may be declared in the following stages;

I. Under situations where discussion on the enforceability of the arbitration agreement

Under sub Article 8.1 of model Law states, *"A court before which an action is brought in a matter which is a subject of an arbitration agreement shall, if a party so request should be during or before submission of his initial statement on the substance of the dispute, refers to the parties to arbitration unless it finds that the agreement is null and void, incapable or inoperative of being done"*

Article II sub-Article 3 of the New York Convention Act states: *"The court of contracting state, when seized of an action of issues in respect of which the parties have made an agreement within the meaning of this article, shall at the request of one of the parties to the agreement, refers to the parties to the arbitration, unless it finds that the said agreement is void, null, incapable or inoperative of being performed[18]"*

These two quotes show that incapability of the parties to the arbitration agreement is enough grounds for refusing enforcement of arbitration awards. A decided case on invalidity of arbitration agreement which had been rejected is the case of *In re Aramco Services Company*.

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[12] (1980) Kuwaiti Civil and Commercial Procedural law

[13] (1958)The New York Convention on the recognition and enforcement of foreign awards of 1958

[14]( 2002)The International Chamber of Commerce Arbitration rules

[15]( 2009) Karam, S., *Emaar Properties to appeal lawsuit ruling,* Arabianbusiness.com, (2009) at http://www.arabianbusiness.com/emaar-properties-appeal-lawsuit-ruling-13830.html

[16](2009) Redfren, A. and Hunter, M., International Arbitration (Fifth ed) (Oxford, UK: Oxford University Press, 2009)

[17] *Commercial Arbitration Centre of the Kuwait Chamber of Commerce and Industry (KCAC)*

[18] (1990)The NYC Art.3

Facts: *The Saudi oil company Aramco had entered into contract with Dyn Corp and the arbitration clause was included in the agreement. The arbitration agreements stated that SAC should be included in the agreement*[19].

Decision: *Subsequently, the appeal court accepted the Aramco request and declared that the trial court lacked the capacity and authority to appoint arbitrator after the court had appointed two Muslims arbitrators t preside over the tribunal*[20].

From the above case, therefore it can be concluded that incapacity and invalidity of the arbitration agreements are enough grounds of not enforcing arbitration awards.

II. The second instance is when the arbitration awards had been challenged by one of the party in set aside proceedings.

Article 34 of the model law sub-section two states that*: "An arbitral award may be set a side by a competent court specified under article six if; The party making the applications furnishes the proof that; a party to the arbitration agreement referred to in sub-Article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it and or, failing any indication thereon, under the of the State…*"

III. Lastly in situations where enforceability of the and recognition of the arbitral awards is claimed by a party to the agreement,;

Under Article 36 of the model law states that: *"Recognition and enforceability of an arbitral award irrespective of the country in the agreement was made, may be refused on condition that; at the request of the party against whom it is invoked, in case the party furnishes to the competent court where enforcement or recognition is sought proofs that;( i)A party to the arbitration agreement referred to in article 7 of the Act was under some incapacity or in other words, the said agreement is not valid under the law to which the parties have subjected it or , failing any indication thereon , under the law of the country where the law was made*[21]*"*

Article 5 of the New York Convention subjection 1 states that: *"Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if the party furnishes to the competent court where the enforcement and recognition is sought, proof that (a) the parties to the agreement referred to in the article (ii) of the Act, under the law is applicable to them, under incapacity, or the said agreement is not valid under the law to which the parties have subjected it or failing any indication thereon, under the law of the country it was*[22] *made…*[23]*."*

Both the model law and New York Convention law of which Kuwait government is a party two, recognizes that incapacity is enough grounds for rejecting arbitration awards and the New York conventions goes further to establish the governing principles under which the concept of capacity to the arbitration principles should apply in something which is not present in the model law[24].

Finding uniformity concerning the applicability of the law concerning capacity of individuals in the arbitration law has been a problem. It has majorly depends on the system of conflicts of law of the forum known as the arbitration agreement[25]. The criterion applicable and should prevail is that legal capacity should be governed by the personal law of individuals

[19]( 2010)*In re Aramco Services Co.,* No. 01-09-00624-CV, (Tex. App. – Houston [1st], March 19, 2010)
[20] (2010)*In re Aramco Services Co.,* No. 01-09-00624-CV, (Tex. App. – Houston [1st], March 19, 2010)
[21] The Implementing Regulations of the Saudi Arbitration Code Art. 3
[22] The NYC Art. IV
[23] *Supra* note 23 at p.97
[24] (2006)Komninos, A., *Recent Development in International Arbitration Around The World,* 2 White and Case Int'l Newsletter 19 at 5-6
[25] A regional code that includes all the Gulf Cooperation Council (GCC)

of each party to the agreement. So it goes without saying that incapacity to arbitration agreements are enough grounds for rejecting arbitration awards[26].

The law normally contains some specific provisions on the capacity to an arbitration agreement. Normally a domestic arbitration like in Kuwait case, the most important think is whether the parties have the legal capacity to enter into the contract and in case they are not then; such arrangements are null and void[27]. In the international arena, problems related to legal capacity is a common thing mostly on the corporations concerning the individuals who are carrying out the arbitration agreement.

## The New York Convention and foreign Award enforcement in Kuwait

Kuwait State is one of the countries which ratified the New York Convention and made reservation agreement regarding enforcement of the awards which are issued by the New York convention (NYC) contracting states[28].

NYC also recognizes incapacity and invalidity of the arbitration agreements as sufficient grounds for not enforcing the awards[29]. The types of grounds for challenging the arbitration awards are less controversial compared to Sheria law used in Kuwait and other Arab countries since they are procedural irregularities. The NYC has given room to all contracting States to refuse recognition or enforcement when the result of either action that would lead to breaching of public policy. Countries like Syria and Kuwait on the other hand have adopted narrow approach concerning the interpreting of the convention on the public policy.[30]

## Conclusion

In conclusion, there are several ways and grounds under which arbitration agreements may be rejected on other grounds apart from incapacity and invalidity. Just like any other contractual agreement, the parties to the contract must have the capacity to enter into the contract. One cannot enter into contract with minors and since most minors have no capacity to enter into contract. The contract must also be valid and in case of invalidity, the contract is deemed null and void. Due to growing importance of the arbitration system in Kuwait, it is continuously growing in Kuwait legislation under law number11 of 1995 which is governing the judicial arbitration on civil and commercial articles[31]. The Kuwait legislation provides enough support that incapacity and invalidity is enough grounds for refusing recognition and enforcement of arbitration agreement.

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[28] Panama Convention art. 5.2.

[29] Art. V(2)(b) of The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards provides signatory states the right to refuse recognition or enforcement of an arbitral award if it is contrary to the public policy of that country.

[30] (2007)Harris T.L, “The Public Policy Exception to the Enforcement of International Arbitration Awards Under the New York Convention” Journal of International Arbitration 24(1) (2007) at p10

[31]( 2012) Although the DIFC Courts are separate from the Dubai Courts, the DIFC Courts enjoy the benefits of an “*enforcement protocol*” with the Dubai Courts (Dubai Law No 12 of 2004 as amended by Dubai Law No 16 of 2011). This protocol ensures that the Dubai Courts shall ratify and execute DIFC Court judgments without “reconsider[ing] the merits” (Art. 7(3)(c) Dubai Law No 12 of 2004 as amended). Further, because DIFC Court judgments are recognised by the Dubai Courts, parties can, in principle, enforce DIFC Court judgments across the Middle East under the GCC and Riyadh Conventions. One such example has already arisen where a DIFC Court order was recognised in Kuwait (*Global Strategies Group (Middle East) FZE v Aqeeq Aviation Holding Company LLC* (DIFC Arbitration 002/2010).

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9. Roy, K., *The New York Convention and Saudi Arabia: Can a Country Use the Public Policy Defence to Refuse Enforcement of Non-Domestic Arbitral Awards,* (1994) Fordham International Law Journal 18 at 921
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# SOME PARTICULAR ASPECTS OF THE LEGAL STATUS OF LOCAL ADMINISTRATION IN THE ROMANIAN AND FRENCH CONSTITUTION

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**Abstract** :

*Part of a wider comparative research focused on the evolution of local government in Romania and France during the last twenty years and, in particular, on the progress made by the two countries in their common way towards decentralization, this study takes into account the relatively recent changes in the Constitution relating to local law and wants to emphasize the sometimes different approaches of legislators as reflected in the specifics of constitutional status in each country, especially the coordinating role assigned to the County Council, under Romanian law, and to the Senate as a national forum of local communities, under French law.*

***Key words :*** **local government, Constitution, local authority, decentralization, County Council, Senate, local status, territorial communities**

## Introduction

The main differences between the legal status of local administration in the two countries relate to the specific coordination tasks assigned to the County Council and the use of the languages of national minorities in public administration, in the Romanian Constitution, and the significant presence of the overseas territories, in the French Constitution. The European issue and that relating to the representation of local communities in the French Senate can also be treated as particular elements in the Constitution. This comparative study will provide a brief presentation of the special role given in the Constitution to the County Council, under Romanian law, and to the Senate, under French law.

### The coordinating role of the romanian county council

The two paragraphs of article 122 of the Romanian Constitution are devoted to the County Council (the so-called "Județ"). The origin of the departmental (county) system in Romania dates back to the 1923 Constitution and the Law on Administrative Unification of 1925. It was maintained until 1938, when the so-called "Ținuturi" were created, which were larger territorial areas than the counties. This was the beginning of a period marked by a lack of local autonomy that the creation of the Regions in 1950 would perpetuate until 1968[1]. Currently, the Romanian County is the single intermediate authority between the local authority and national government, unlike the administrative organization of France which has three territorial levels. As for the local authority, the County provides a framework for both decentralization and devolved administration[2].

1 A. Iorgovan in M. Constantinescu, A. Iorgovan, I. Muraru, E.S. Tănăsescu, *Constituţia României revizuită - comentarii şi explicaţii* - (The revised Constitution of Romania - comments and explanations -), All Beck, Bucharest, 2004, pp. 258-259.

2 In French «administration déconcentrée».

The common tradition with France on administrative control and the choice of a two-level territorial administration explains the choice in the Romanian legislators of 1991 to empower local authorities and towns and to limit the involvement of the County to a coordinating role (art. 122 para. 1 of the Constitution). The County Council becomes the arm "of the public administration" charged with "coordinating the activities of local and town councils." The objective set is "the achievement of public services in the interests of the County." This coordinating role is reiterated in the Law on Local Government no. 215/2001 as amended in article 87 paragraph 1.

It is generally considered that the arrangements for coordination of the activities of local and town councils, underpinning the County Council in Romanian law, is solely the implementation of public services in the interests of the County and expresses the intention of the legislators to increase the autonomy of the local authority[3]. This provision of the Constitution is also criticized in theoretical literature because it "preserves only one aspect of the powers of County Councils" while "in reality, the County Councils also have other powers"[4]. At the same time, legal literature includes this aspect in the category of the specific powers of County Councils[5]. A clarification comes in the amendments made by Law no. 286/2006. According to the new art. 101 para. 1 of the Law no. 215 /2001 (art. 87 para. 1 following publication of the new Law in 2008), the coordinating role is the general element that defines the County Council as the authority organized at county level and not a separate category of responsibilities among the five listed in the amended article 104 para. 1 of the General Law on Local Government (corresponding to the current article 91 para. 1 which now includes six categories[6] of responsibilities). It is therefore possible to say that the legislators have proceeded to align the law with the Constitution. Under the new article 104 para. 5, section d) of the above Law, the County Council shall offer, upon request, technical assistance to the communities in the County. This provision is part of those duties pertaining to management of those public services for which it is responsible (art. 104 para. 1, section d). Even if they were renumbered following the publication of the new Law no. 215/2001 in 2008, we find these almost identical provisions, in the current text, article 91 para. 1, section d) and para. 5, section d). The County Council is made responsible for and must provide, upon request, its advice in specific areas, for the benefit of the communities in the County "as stipulated by law."

If we compare the exclusive powers of local authorities and towns set out in the Law of Decentralization no. 195/2006 (article 21 sections a) -m)), on the one hand, and those assigned to the County (art. 22 sections a) -g) of the same law), on the other hand, the preference of the Romanian legislator for the local authority is plain to see. According to the same text, this priority can also be seen in the case of the aportionment of competences with central government, where significantly more powers are devolved to local authorities and towns (article 24 sections a) -k ) of the Law no. 195/2006) than to the Counties (art. 26 sections a) -g)). This confirms the intention of the legislators as derived from article 122 of the Constitution.

Succinctly written, the second paragraph of article 122 stipulates that the County Council is an "elected" authority that "operates under conditions stipulated by law." As formulated, the drafter of the Constitution once again shows a flexible approach and allows the legislator to determine, at the County level, direct or indirect elections, as well as to

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3 C. Manda Manda C.C., *Dreptul colectivităţilor locale* (The law of local communities), 2nd revised and supplemented ed., Lumina Lex, Bucharest, 2005, p. 173.

4 D. Brezoianu, *Drept administrativ român* (Romanian administrative law), All Beck, Bucharest, 2004, pp. 414-415.

5 R.N. Petrescu, *Drept administrativ* (Administrative law), Accent, Cluj-Napoca, 2004, p. 209.

6 The last category relates to the general heading of "other duties stipulated by the law" (art. 91 para. 1, section f)).

establish one or more executive authorities. As regards the local authorities, the principle of holding elections is a constitutional guarantee for the existence of the County Council. In the absence of any express provision in article 122, the correlation with the new para. 4 of article 123 of the Constitution makes clear that the President of the County Council is also a constitutionally protected[7] body.

Like in France, Romanian county councillors[8] are directly elected. If, in the case of France, their constituency is the so-called “canton”, in Romania it is at County level (art. 10 para. 2 of the Law on Election of Local Government no. 67/2004). The duration of their mandate also varies : 6 years in France and only 4 years in Romania. The number of Vice-Presidents is between 4-15 in the French case, provided that their number does not exceed 30% of the total number of councillors, while the Romanian County Council has only 2 Vice-Presidents (art. 101 para. 1 of Law no. 215/2001 as amended). Despite its coordinating role, the Romanian County Council remains an autonomous administration, which excludes any form of subordination in its relations with any other local authority. The lack of hierarchy and the cooperation between local authorities are characteristics of the legal status of local administration as reflected in the Romanian Constitution[9].

## The french senate, representative of territorial communities

In addition to the great diversity that characterizes the institutional nature of the French overseas and dependent territories, one should also include the enhanced role of the Senate in representing all the territorial units of the Republic, under the new article 39 of the Constitution. Henceforth Bills whose main purpose concerns territorial[10] organization are submitted firstly to the Senate, which has simply been the formalisation of an already existing practice. Through its constitutional and legislative oversight[11] and the exercise of its control[12] functions, the French Senate has contributed to the development of a better defined legal framework for local government. To strengthen the dialogue[13] between the actors of decentralization, the Senate has also developped an information channel[14] for the local actors.

Unlike French senators who are appointed by indirect universal suffrage through an electoral college organized in each County, for a term of 6 years, Romanian Senators are directly elected for 4 years (articles 62 para. 1 and 63 para. 1 of the Constitution). At the same time, in accordance with article 75 para. 1 of the Romanian Constitution, Bills concerning the organization of local government, territorial organization and the general arrangements for local autonomy (art. 73 para. 3, section o)), on administrative disputes (art. 73 para. 3, section

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7 In this sense see Iorgovan A. Constantinescu, A. Iorgovan, I. Muraru, ES Tănăsescu, *op. cit.,* pp. 259-260.

8 The very recent Law no. 2013-403 (17 May 2013) renamed the French county councillors ("conseillers généraux") as “departmental councillors” ("conseillers départementaux"). Their next election will take place in 2015.

9 C. Manda, C. C. Manda, *op. cit*., p. 174.

10 One should note some difficulties of interpretation of the purpose of these Bills.

11 Apart from discussion of the texts submitted to it, the French Senate, as the advocate of local liberty, led the Constitutional Council to rule on several occasions for local authorities. It is also important to add that the constitutional reform of 2003 introduced into the fundamental Law a few principles which the Senate had been defending for a long time for the benefit of the local communities.

12 These consist of senatorial fact-finding visits, study groups, information reports, classic written and oral classic questions with or without debate, as well as a Senate Committee for decentralization. Composed of 25 senators, it has been operating as a network since January 19, 2005. In April 2009, a Senatorial Delegation for territorial communities and decentralization was created.

13 In December 2011, the President of the Senate decided to organize the so-called “Etats généraux de la démocratie territoriale” in order to learn the expectations and proposals of the “élus” about the future of their communities.

14 The French Senate organizes various events and meetings such as "Citizens of local elected officials", and since 1998 it has at its disposal a Local Authorities Service and, since February 1999, a Permanent Forum for exchange and information, "Crossroads of local authorities" (http://carrefourlocal.senat.fr).

k)) and on use of the mother tongue of minorities in relations with local authorities and devolved services (art. 120 para. 2) must first be presented to the Chamber of Deputies. In Romanian law, the Chamber of Deputies is the decisional body. Apart from matters expressly stipulated in the constitutional provisions mentioned above, other Bills or legislative proposals are submitted first to the Senate. A role reversal can be seen between the Chambers of Parliament in comparison with the French case.

In France, a senator is the representative of the Nation. According to the Declaration of the Rights of Man and of the Citizen (art. 3), a senator does not represent his district, but the Nation itself. At the political level only, he is also the representative of the County where he was elected by the so-called "big electors"[15]. The method of electing French senators leads to a strong representation of territories because they are elected by local politicians, especially those in charge of local administration. The multiple mandate[16] system permits the vast majority of French senators to carry out a local elective mandate[17], which keeps them in direct contact with local issues. During their mandate, members of the Romanian Senate "serve the people" (art. 69 para. 1 of the Constitution) and their function "is incompatible with the exercise of any civic authority, apart from that of a member of the Government " (art. 71 para. 2 of the Constitution).

It is significant to note that the second paragraph of article 62 of the Romanian Constitution guarantees the right of organizations belonging to national minorities to be represented in Parliament. Thus, minority organizations which do not obtain the number of votes necessary for parliamentary representation each have, under the conditions stipulated by the electoral law, a parliamentary seat. Citizens of a minority cannot be represented by a single organization. Considered a measure of "positive discrimination" which brings "uniqueness" to the Romanian constitutional system, this provision is justified by the protection of the right to identity stipulated in article 6 para. 1 of Constitution[18] .

**Conclusion**

These two particular aspects of the legal status of local administration emphasize a different choice of the legislators in the countries studied. The Constitution assigns a coordinating role to the County Council mainly explained by the specific historical evolution of the County in the administrative organization of Romania. It is also important to mention that the office of President of the County Council has been directly elected since 2008. Coordination is limited to the activity of the local councils and the purpose is only to provide high quality services at the County level. Thus the main objective of the legislator is to strengthen the autonomy of the local authorities. In the French example, multiple mandates and the particular way in which senators are elected explains how territorial communities are

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15 There are approximately 150,000 “big electors” who are required to participate in the vote. This college is composed of deputies, regional counsellors, councillors of the Corsican Assembly, county councillors, councillors of the city of Paris as well as delegates of local councils whose number is based on the population in their area. It is a system that leads to a strong representation of rural communities within the college. As 95% of Senate delegates represent the local councils, the Senate is the Grand Council of Municipalities of France.

16 Two very recent laws (published in the Official Journal the 16th of February 2014) prohibit multiple mandate of French Senators. Despite their opposition, these provisions will be applied for the first time after the elections of March 2017.

17 As of 24 September 2007, 79.75% of French Senators were serving at least one local mandate (www.senat.fr). It is interesting to note that the Socialist Party wants to ban its senators from holding an extra mandate in a local authority, an idea confirmed by party activists in a referendum of 1 October 2009. Despite the hostility of its senators to the measure, the rule prohibiting multiple mandate would have immediate effect. Senators whose mandate was to be renewed in 2011 could retain their positions in the local authorities for a further year, to organize a successor. In 2011, the French Senate was composed of 348 senators.

18 M. Constantinescu in M. Constantinescu, A. Iorgovan, I. Muraru, E. S. Tănăsescu, *op. cit*., p. 120.

represented in the Senate. The French Senate offers territorial communities the opportunity to be directly protected at national level, in the legislative arena. In this way, Senators can promote local interests through their various parliamentary activities. In both cases, local communities benefit from constitutional protection and can make a major contribution to the development of local government law.

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# THE CHARTER OF THE UNITED NATIONS AND INSTITUTIONAL SYSTEM FOR THE PROMOTION AND PROTECTION OF HUMAN RIGHTS

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**Abstract**

Institutional system for the promotion and protection of human rights was established by the Charter of the United Nations and on its basis thereof is part of the category of monitoring mechanisms, promotion and protection of human rights to universal level. This, together with the mechanisms carried out on the basis of conventions O. N. U. relating to human rights, has an important role in the surveillance promotion and protection of human rights and, by default, in implementing the provisions as regards international regulations in this matter.

To promote and encourage respect for human rights and fundamental freedoms, the United Nations uses its subsidiary bodies, entities that have specific powers on the area referred to.

**Key words**: Charter of the United Nations, Institutional system, protection, human rights, mechanisms.

## Introduction

For the purposes of supervision and application of U.N.conventions relating to human rights have been created distinct mechanisms, most of which, in fact, carried out under the provisions of conventions concerned. Also, along with these was carried out by the Charter of U.N. and in its basis an institutional system that can have an important role in promoting and monitoring protection of human rights and, by default, in the implementation of international regulations implement the provisions aimed this problem[1].

The institutional framework for the promotion and protection of human rights established by the Charter of U.N. adopted on 26 June 1945 and entered into force on 24 October 1945 (document by which it is fully constituted the United Nations), belongs to the category of monitoring mechanisms, Promotion and protection of human rights to universal level.

Article 1 of the Charter indicates right end of the U.N. "*achieving international cooperation in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion*".

In addition, in Article 55 c) of the Charter shall be stated that the *United Nations will foster effective and universal respect of human rights*.

For the proper functioning of the U.N., in accordance with the provisions of Charter, the organization has two categories of components, namely:

- *main bodies* (General Assembly, Security Council, Economic and Social Council, Trusteeschip Council, The International Court of Justice and the Secretariat); and
- *subsidiary bodies*, entities set up by main organs, with a complete delegation, made up of representatives of the Member States or specialists, with the aim of contributing to the achievement of goals and organization of its main components.

The main bodies and of a large part of the subsidiary bodies have, in accordance with Charter of the United Nations and other acts for the setting up, organization and functioning, specific powers

[1] Raluca Miga Beşteliu and colab. – International protection of human rights. Courses notes, Edited by S.C. Universul juridic, Bucharest, 2008, pages 188-189; Tudor Tănăsescu – International protection of human rights. University course, Sitech Publishing House, Craiova, 2013, page 41.

to attain one of these purposes stipulated by the Charter, namely "*promoting and encouraging respect for human rights and fundamental freedoms for all without distinction of race, sex, language, or religion*".

**Consideration of institutional system for the promotion and protection of human rights established by the Charter of the United Nations and in its base[2].**

**A. Main bodies of the U. N.**

***a) The U.N. General Assembly***

It is the most representative of the organization main body, with the most important functions and powers in the field of promoting and respect for human rights, composed of representatives of all Member States[3].

The Charter of the U.N. assigned competent in the matter of human rights to General Assembly, which are concerned about the promotion and their coverage. Thus, under the Charter, the General Assembly is competent to initiate and make recommendations with a view to "*supporting accused human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion*"[4]. For the fulfilment of this powers General Assembly has adopted and opened for signature, a significant number of international conventions relating to human rights, documents which have been promoted and preceded by resolutions and, respectively, of declarations of it, sometimes particularly, as well as Universal Declaration of Human Rights and the Declaration on disposal of all forms of racial discrimination. In the light of these prospective the General Assembly shall receive and examine reports sent by the other components of the United Nations with powers in the area of human rights.

General Assembly works in committees, entities which form an integral part of Assembly. In domain of human rights the most important committee is the Committee for social problems, cultural and humanitarian.

According to the Charter of the United Nations, the General Assembly may establish such *subsidiary organs* as it considers necessary for the performance of its functions[5]. In the domain of human rights, the General Assembly has created several such components, among these we mention:

- The Special Committee to examine the situation with regard to the implementation of the Declaration on the granting of independence colonial countries and peoples[6], created in 1961;
- The United Nations Committee for Namibia, created in 1967 [7];
- The United Nations High Commissioner for Refugees created in 1950;
- The United Nations High Commissioner for Human Rights created in 1967;
- The Human Rights Council created in 2006 and so on.

***b) The U.N. Security Council***

It is one of the six main bodies of U.N. , with limited competence and political role, which returns as main responsibility maintaining peace and international security. It is made up of 15 members of which 5 permanent and 10 elected for a period of two years.

The U.N. Security Council may decide that an international context represents a threat to peace, a breach of it or an act of aggression and, consequently, may decide on measures involving use of force to maintain or restore international peace and security.

According to The Charter of the United Nations, *powers in the area of human rights they had only General Assembly, Economic and Social Council and the Trusteeship Council, as well as subsidiary bodies thereof* [8]. Starting with the seventh decade of the XX century, in the exercise of its role in maintaining peace and international security, the Security Council decided that serious infringements, which are bulky and repeated human rights violations may constitute threats against

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[2] Niciu I. Marţian, International public law, Servosat Publishing House, Arad, 2004, page 230; Tănăsescu Tudor, op.cit., page 42 and International public law. University Course, Second edition revised and added, Sitech Publishing House, Craiova, 2013, page 13; Scăunaş Stelian, International law of human rights. University Course, All Beck Publishing House, Bucharest, 2003, page 39.

[3] In present U.N. have 192 of states in its component.

[4] Art.13, point 1, letter b).

[5] Art. 22

[6] The declaration was adopted by the U.N. General Assembly Resolution No 1514/XV of 14.12.1960.

[7] Main function of the Committee was that of the administration of African South-Western acquisition up to its independence.

[8] Art. 13 part 1b, art.62 part 2, art.76 letter c).

peace[9]. Therefore, the Security Council adopted resolutions of condemnation of such violations, as well as for action to be taken against them.

For example policy condemnation of racial discrimination and aparheid in South Africa, as well as for non-compliance with armament embargo on, and designating as a threat to peace and security. It has been claimed and taking the coercive measures, but failed due procedure veto permanent members of the Security Council[10].

Also, they are to be mentioned here that the involvement of the Security Council in serious cases of breach of human rights and fundamental freedoms, which could endanger international peace and security, those which have affected Namibia (Africa South-Western) starting from the year 1969, Somalia or ex-Yugoslavia in the 1990s.

In the same plane also ranks among the reasons for the decision of the Security Council for the creation of ad hoc international criminal tribunals (the one for the former Yugoslavia and for Rwanda), who will judge abetted by natural persons of crimes committed during the genocide against humanity or of war, International facts regarded as particularly serious breaches of essential human rights[11].

***c)The Economic and Social Council* (ECOSOC)**

This is the main body of U.N which, in accordance with Charter provisions, *has major tasks* in promoting economic and social cooperation international, and *in favoring universal and effective compliance with the human rights of any person*.

To carry out its tasks increasingly circumscribes competence has been established by the Charter, namely those concerning international cooperation in economic, social, cultural, education and public health domain, including those relating to compliance with effective and universal human rights[12], ECOSOC had been invested by the Charter with functions and powers as well as [13]:

- *initiate studies and reports* on international issues in the economic, social, cultural, education, health and other related fields and may make recommendations concerning them to the U.N. General Assembly, of its members and specialized institutions concerned;
- *may make recommendations, in order to promote compliance with effective and universal human rights* and fundamental freedoms for all;
- *may prepare draft Convention* on matters within its field of competence, which it shall submit to General Assembly;
- *may convene international conferences* in matters within its competence;
- *can coordinate the work of the specialized institutions* in consultation with them, and through their recommendations to the General Assembly or of its members;
- can with authorisation by the General Assembly, *to carry out the services that the members of the producer organization or specialized institutions are asking for*.

For the purpose of carrying out these functions and powers, ECOSOC founded several specialized subsidiary bodies, as well as*: The Human Rights Commission; The Committee on Economic, Social and Cultural Rights; The Commission on women's condition, The Human Rights Council* [14].

***d)The Trusteeship Council***

Although it has suspended its activities[15] it is important to state that the Council is a main body of U.N., which is to assist General Assembly, for the purpose of carrying out its functions of the organization in respect of the arrangements for international tutelage provided for in XII chapter of the U.N. Charter. International tutelage regime has been established by the U.N. Charter for management and monitoring territories that were to be placed under this scheme under agreements which were not due to be finished until later Charter adoption. It is important to state that under the U.N. Charter one of the objectives pursued by the regime of tutelage was "*to encourage respect for human rights and*

[9] Resolutions 1160, 1199 and 1203, relating to the situation in Kosovo during the 1998-1999, as appears at Miga Beşteliu Raluca and colab., op.cit., p.194.
[10] Marcu Viorel, International mechanisms to guarantee the human rights, Sigma Plus Publishing House, Deva 1998, page 108.
[11] Courts created by the Resolution of the U.N. Security Council No 827 of 25 May 1992 and its Resolution of the UN Security Council No. 955 of 8 November 1994.
[12] The U. N. Charter, art. 55, letter c) and art. 60.
[13] Ibidem, art.62-66.
[14] Details in the following sections.
[15] Last territory under the U.N. tutelage was the Islands Palau (South Pacific) which became independent in the year 1984.

*for fundamental freedoms for all without distinction as to race, sex, language or religion, and to develop a sense of independence of the peoples world*"[16].

To achieve this objective, the Trusteeship Council may fulfill the following functions[17]:

- *examines the reports submitted to the administering authority* (those responsible for managing territories);
- *receives petitions* and *shall examine them*, *in consultation with administering authority*;
- *organise* periodic *visits in the territories under the tutelage*;
- *it takes the action* of the above, and others, *in accordance with the provisions of the agreements of tutelage*;
- *it draws up a questionnaire concerning the inhabitants of progress territory under the tutelage* (from a political point of view, economic, social and educational one) on the basis of which it shall draw up a report that is to be submitted to an annual General Assembly.

***e) The International Court of Justice***

It is the principal judicial main body, composed of 15 judges elected for a period of nine years by the General Assembly and the Security Council, their terms of office may be renewed. The International Court of Justice *has contributed to the promotion of human rights interpretation of international standards in this area by means of both judgments* (dispute between Colombia and Peru on the right of asylum, In question "Haya de la Tore" diplomatic asylum) *as well as through advisory opinions* (opinion at the time of the acceptance of formulation of reservations to the Convention for the prevention and fight against crime of genocide 1951, opinions on the matter is cut off of peace treaties relating to Bulgaria, Romania and Hungary, at the request of the U.N. General Assembly[18]).

*Also, the International Court of Justice is designated as body of the settlement of any disputes between States Parties to numerous international treaties of human rights concerning the interpretation and application of the provisions of such substances* (e.g. The Convention relating to the status of refugees - 1951; the Convention on the rights of the woman's political - 1952; the Convention on the elimination of all forms of racial discrimination in 1965; the Convention for the elimination of crime and punish apertheid - 1973, and so on).

Although the number of causes in this field solved by The International Court of Justice has been reduced, this U.N. body remains an instrument to judicial review important for Member States to settle disputes that may arise in the application of international treaties relating to human rights, to the extent that these agreements provide for such a possibility.

***f)The U.N. Secretariat***

The Secretariat is one of the U.N. main body which has important powers in the area of human rights. It shall be composed of the Secretary-General and the staff of the Secretariat.

*The Secretary- General* shall be the chief administrative officer of the U.N. appointed by the General Assembly on the recommendation of the Security Council. This, in addition to administrative role, *meets and a political role and important diplomatic he acting to resolve tasks laid down by the General Assembly and the Security Council, including in the area of human rights.* For this purpose the Secretary-General may use *confidential offices* between the Member States, better understood as well as switching of capital punishment, the release of prisoners, and so on. Also, Secretary-General may be entrusted with *mandates on issues* of human rights, either at the level of the Commission for Human Rights, or on the Subcommittee.

In the U.N. Secretariat during the period 1982-1997 has been running the *Center for Human Rights*, which is led by the Deputy Secretary-General responsible for human rights. This body, which initially was called human rights Division, have the right to support General Assembly, the Economic and Social Council, the Commission for Human Rights in the promotion and protection of the human rights and fundamental freedoms.

Following the proposals earlier in the year 1993, by its resolution of U.N. General Assembly No. 48/141 of 20 December 1993 has been set up the office of *High Commissioner of the United Nations for Human Rights*. The High Commissioner has rank of deputy Secretary-General, having its registered office in Geneva and a liaison office in New York. The appointment of such arbitrator shall be made by the UN General Assembly, for a term of four years with the ability to be renewed.

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[16] The U.N. Charter, art.76, letter c).
[17] Ibidem art.87 and 88.
[18] General Assembly Resolution No. 294(IV) on 22 October 1949.

In the year 1997, the office of High Commissioner of the United Nations for Human Rights merged with the Center for Human Rights, resulting in High Commissioner of the United Nations for Human Rights[19]. This structure is headed by the High Commissioner (with rank of deputy secretary general). Between the powers of the United Nations High Commissioner also mention:

- promoting effective exercise of human rights;
- initiation of actions in the case serious violation of human rights;
- the implementation of the activities of an educational nature in favor of human rights.

**B. Subsidiary bodies with special powers in the area of human rights.**

***a) The Commission for Human Rights.***

It was the most important subsidiary body for the Economic and Social Council (ECOSOC) established by that body in the year 1946, on the basis of Article 68 of the U.N. Charter. The Commission was a political body, which is made up of representatives of 53 Member States, selected after the criterion equitable geographical distribution, the mandate being of 5 years.

Since it was the main body of ECOSOC in the area of human rights, the *Commission had mandate to carry out studies and reports, to provide information and other services in the human rights*.

*The Commission has prepared recommendations and has drawn up draft of international legal instruments in the domain of human rights.*

In order to achieve these attributes the Commission has set up *special working groups* composed of experts and even some *subcommissions* on matters of human rights. Such a procedure has been applied, for example, in the case it was prepared texts of the Universal Declaration of Human Rights and international pacts of the human rights in the year 1966, when the Commission concerned and work took place on working groups. Over time, powers of the Commission were extended this being involved in most of the problems of human rights (examination of breaking human rights, analysis of breaking human rights in a given country or sector and the issue of appropriate recommendations, and so on).

For the purposes of fulfilling its tasks the Commission for Human Rights, it has created some subsidiary bodies-subcommissions.

Thus, with the authorisation of ECOSOC, the Human Rights Commission created in the year 1947 *Subcommission to prevent discrimination and protection of minorities*. The purpose of creating this Subcommission was to develop studies and advise the Commission for Human Rights to prevent discrimination of any kind in the exercise of human rights and fundamental freedoms and for the protection of ethnic minorities racial, national, religious and linguistic, but also in order to carry out any other tasks which may be delegated to it by ECOSOC and the Commission for Human Rights. Subcommission to prevent discrimination and protection of minorities has participated in the elaboration of some texts of the treaties of human rights and to develop procedures for their application, As well as the implementation of other documents of the U.N. , such as the Declaration of the rights of people belonging to national minorities or ethnic, religious or linguistic, adopted by the U.N. General Assembly in 1992. Also, subcommission has created working groups on various issues of human rights (communication breach of human rights, contemporary forms of slavery, rights of indigenous peoples, illegal prison) and he did the same in the consideration of complaints relating to human rights violations, in accordance procedures 1235 and 1503[20].

*In the year 1999 the subcommission* to prevent discrimination and protection of minorities, taking into account the development of its domain in human rights *has changed his name, in Subcommission for the promotion and protection of human rights.*

For a short period of time in the Commission for Human Rights has been created, as its subsidiary body, the *Subcommission for women's condition*, but in the same year (1946), the setting up, this subcommission granted the status as the Commission[21].

By resolution of the U.N. General Assembly No 60/251 of 15 March 2006, it was decided to set up the **Council for Human Rights[22]** at its head office in Geneva as part of the U.N. reform for the

[19] Miga Beşteliu Raluca and colab., op.cit., page 207

[20] It was established by the Economic and Social Resolution No 1235 of 1967 and ECOSOC Resolution No. 1503 of 1970, as revised in 2000.

[21] ECOSOC Resolution, No.11(II) on 21 June 1946.

[22] Bianca Selejan-Guţan, European protection of human rights. Master, C.H. Beck Publishing House, Bucharest, 2008, page 18

protection of human rights, to replace the Commission for Human Rights that subsidiary body of the U.N. General Assembly. On 16 June 2006, the Commission for Human Rights has ceased and during the period 19-30 June 2006 was carried out first session of the Council for Human Rights.

The main responsibility of the Council is to promote a universal respect for human rights and fundamental freedoms. Unlike the Commission, the Council is directly subordinated to General Assembly and has a permanent character.

The Council for Human Rights decided that in the first stage of its activity to use all of the procedures and mechanisms for monitoring compliance with human rights created the Commission for Human Rights, that in parallel to examine, to review and improve current procedures and mechanisms, based on experts and mechanisms for complaints.

***b) The Committee on Economic, Social and Cultural Rights***

The Committee on Economic, Social and Cultural Rights is a subsidiary body of the U.N. created by Economic and Social Council (E. C. O. S. O. C. ). Unlike the international Pact on civil and political rights, the international pact on economic, social and cultural rights in 1966 has not provided for the establishment of a Committee to follow how to comply with its provisions. This shortcoming has been rectified subsequently, by the adoption of E. C. O. S. O. C. of Resolution No 1985/17 of 28 May 1985, in which it has set up the *Committee on economic, social and cultural rights*. The Committee has replaced the working groups created in 1976 and 1981, which had the mandate supporting E. C. O. S. O. C. in assessing progress made by States for the application of the provisions of the international Pact for economic, social and cultural rights.

*The role of the Committee is to examine, on the basis of the reports submitted by Member States, the measures they have taken relating to the application of the provisions of international Pact on economic, social and cultural rights.*

Reports of Member States shall be examined initially by a group made up of 5 members of the Committee which shall draw up a list of specific problems that require additional information. Then the reports are examined in plenary session by the Committee with the participation of representatives of the Member States.

At this activity, with a view to obtain additional information, it was established the practice to invite in addition to the representatives of the Member States and the specialists in the field.

*Each year, the Committee shall submit to E. C. O. S. O. C. a report* which shall be submitted, in brief, the debates in annual meeting of the Committee *on the reports submitted by the States party to Pact and make suggestions and general recommendations to E. C. O. S. O. C.* .

*In the last few years, it has done for the establishment of a system of individual or collective complaints in the form of an optional protocol to the international Pact on economic, social and cultural rights.*

The specific document was adopted by the Council for Human Rights and submitted for authorisation by the U.N. General Assembly.

According to the Protocol project, States parties shall recognize an opportunity for individuals to refer the Committee on economic, social and cultural rights with individual communications or group by being invoked infringements of the rights recognized in international Pact on their economic, social and cultural rights. It also recognizes the competence of the Committee to receive and analyze communication interstate agreements, subject to formulate a declaration to this effect by the State party to the Protocol.

***c) The Commission for women's rights***

It has been created in the year 1946 by Economic and Social Council on the basis conferred by Article 68 of the U.N. Charter. It is a subsidiary body of ECOSOC of political nature.

The powers of the Commission for women's rights have been laid down by the Economic and Social Council in its resolution on the setting up of it, and by a subsequent resolution[23].

According to the specific documents, the powers of the Commission shall consist of: *(a) presentation of recommendations and reports to ECOSOC regarding the development of woman's rights in the political, economic, social and education domain; (b) presentation of recommendations and proposals to the Council in connection with urgent matters on woman's rights*, for the purpose of applying the principle of equal rights between men and women.

[23] Resolution No.11(II) on 21 June 1946 and Resolution No. 48 (IV) om 29 March 1947 (E/437)

Resolutions, recommendations and other documents on which the Commission shall adopt them shall be subject to approval by ECOSOC.

In the last few years, the activities of the Commission increased significantly, the latter being involved in organization of World Conference of the United Nations for Women (1980) and in carrying out the project Convention on the elimination of all forms of discrimination against women, adopted by the General Assembly in the year 1979.

Also, with the consent of ECOSOC, the Commission has acquired and competent to receive and examine complaints relating to women's rights violation.

***d) The United Nations High Commissioner for Human Rights***

Setting up of the High Commissioner of the United Nations for Human Rights has been, for the first time, in the "60s", but the implementation of this idea was done much later (in 1993) by the U.N. General Assembly which by its Resolution 141/48 from 20.12.1993 to set up the function referred to. According to this resolution, the *The United Nations High Commissioner for Human Rights* is high official of the United Nations which *has primary responsibility for the U.N. activities*, *in the human rights domain* under the leadership Secretary -General. He *is the deputy Secretary-General for human rights*, provides his offices in the name of the Secretary-General, thus becoming primarily responsible for conducting activities on human rights. *His mission is to promote and protect human rights in all countries and to maintain a permanent dialog with them.* To carry out this task the High Commissioner for Human Rights exercise more functions as regards crisis management, prevention and early warning, helping Member States in transition, promoting fundamental rights, coordination and rationalization programs relating to human rights, and so on.

After 15 September 1977, *there has been created High Commissioner of the United Nations* for Human Rights through the merger of High Commissioner for Human Rights Office with the Center for Human Rights, the new organism having in present the biggest responsibilities in the promotion and observance of human rights.

***e)* The United Nations High Commissioner for Refugees**

It was set up by the U.N. General Assembly by resolution no. 428 (V) of 14.12.1950 , starting to operate on 1 January 1951. *The aim to create this* subsidiary *body* of the U.N. General Assembly *was the achievement of a better level of protection in the case international refugees*.

The High Commissioner for refugees shall be elected by the General Assembly, on the proposal from the Secretary-General , the mandate being of 5 years.

The United Nations High Commissioner for Refugees has its headquarters in Geneva and several representations (offices) in countries or regions which are experiencing problems with refugees.

To achieve the aim, the United Nations High Commissioner for Refugees meet the following functions[24]:

- *performed international protection of the refugees* through the promotion of conclusion and ratification of international conventions for the protection refugees;
- *it is looking for immediate solutions on their problems*, *through the provision of assistance* (food aid, medical, conditions for a shelter);
- *provides* long-term *support resulted* in measures concerning*: any voluntary repatriation of the refugees* if the conditions of the country of origin permit*, naturalization in the first country of refuge and resettlement in another country,* in the case in which the first country of refuge has no possibilities of assimilation.

The United Nations High Commissioner for Refugees cooperates with the U.N. and its specialized institutions and for the purpose of protection and assistance refugees, in accordance with the Treaties adopted in this domain, but also with non-governmental organizations (E.g. The International Committee of the Red Cross).

Also, the United Nations High Commissioner for Refugees collaborates with regional bodies, such as the Council of Europe.

**Conclusions**

♦ The institutional framework for the promotion and protection of human rights established by the Charter of the United Nations *is part of the category of monitoring mechanisms, promotion and*

[24] Miga-Beşteliu Raluca and colab., op.cit., page 193

*protection of human rights to universal level, extra-conventional* control *mechanisms* and implementation of human rights (created in the framework of the United Nations Organization, on the basis of Charter).

♦ *Instruments that make up the institutional system framework created by the Charter of the United Nations and in its domain in human rights are U.N.* main bodies (General Assembly, the Security Council, The Trusteeship Council, International Court of Justice and the Secretariat) *and a large part of the subsidiaries* (The Commission for Human Rights, the Committee on Economic, Social and Cultural Rights, the Commission for Women's Rights, the High Commissioner of the United Nations for Human Rights and the United Nations High Commissioner for Refugees).

♦ *Express Powers in the area of human rights have,* according to Charter of the United Nations*, only three main bodies of U.N. (*General Assembly, Economic and Social Council and the Council of Trusteeship*) and subsidiary bodies in their domain regarding human rights.*

♦ *In relation to their nature instruments/mechanisms* forming the institutional system *framework for the promotion and protection of human rights be carried out in the Charter of the United Nations are part, the exception is the International Court of Justice from the group non-judicial mechanisms* (universal characteristics of the system in the protection of human rights by using procedures that state reports, reports by the control bodies, complaints about statehood, surveys and so on).

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# A BRIEF OVERVIEW OF THE EFFECTS OF CONTRACTUAL IMPREVISION

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**Abstract**

*This study is aimed to review the provisions of article 1271 of the New Civil Code and, in particular, the effects of contractual imprevision. We have attempted to outline the possibilities that this relatively new institution which has appeared in the Romanian legal landscape makes available to the parties in view of restoring the contract equilibrium further to the occurrence of exceptional circumstances, namely the limits set for the subsidiary intervention of the court when negotiations fail.*

**Keywords:** *negotiation obligation, adaptation by negotiation, adaptation in court, termination of the contract, overcoming contractual risk.*

## 1. Introduction

The theory of contractual imprevision is a concept which arose vivid controversies, on account of the effects it produces. Initially, it was rejected under the Old Civil Code, taking into account the nominalistic principle, set in article 1578 in the matter of money lending agreements[1]; at a later time, it was proposed that this provision be interpreted as optional[2], while some authors even wondered whether it had already become obsolete[3].

All these disputes were ended by the New Civil Code, in article 1271[4], which regulates the conditions and effects of contractual imprevision. In this text, the Romanian lawmaker aimed to align the domestic law to the standards promoted at European Union level, as the text

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[1] This legal provision read: *The obligation arising from a money loan is always for the same value shown in the contract. Whenever the value of a currency increases or decreases, before the due date for payment, the debtor shall return the exact numeric amount it had borrowed and shall only return such amount in the specie in circulation at the time of payment*.

[2] R.I. Motica, E. Lupan, *Teoria generală a obligațiilor civile*, Lumina Lex Publishing House, Bucharest, 2008, p. 76; L. Pop, *Tratat de drept civil. Obligațiile.Contractul,* volume II, Universul Juridic Publishing House, Bucharest, 2009, p. 537.

[3] R.I. Motica, E. Lupan, *op.cit.*, p. 77.

[4] We mention that, based on Article 107 of Law no. 71/2011 for the application of Law no. 287/2009 on the Civil Code (published in the Official Gazette no. 409 of 10.06.2011), these provisions only apply to the contracts concluded after 1 October 2011, the date of coming into force of the Civil Code.

relies on the provisions of article 6:111 of the Principles of European Contract Law[5], and its basis is represented by the concept of contractual justice[6]. In essence, imprevision or a posteriori prejudice[7] covers the prejudice incurred by one of the contracting parties further to a significant value imbalance which occurs between the performances of the two parties, in the course of contract performance, on account of currency value differences or other circumstances, provided that the generating effects do not make the contract unenforceable, but make the contract performance excessively onerous for one of the parties[8].

## 2. Adaptation by negotiation - the main objective targeted by the parties

In virtue of the principle of contractual freedom, the parties are entitled to "integrate the future"[9] by way of indexation or adjustment (hardship) clauses[10] by which, anticipating the unforeseeable event and the relevant costs, the parties agree on the manner of restoring contractual equilibrium: by way of indexation, two economic values are correlated in order to maintain over time the present value of contractual obligations, this indexation being applied automatically, as opposed to the second category of clauses, which involve an active involvement of the contracting parties, due to the express commitment to readjust, from time to time, the correspondent performances of the parties, given the changes in contractual circumstances. However, in such a case, the mechanism of imprevision cannot be applied, the parties relying instead on the mentioned clause, in virtue of the principle of the binding force of the contract, regulated by article 1270 of the New Civil Code.

Therefore, this study aims to identify the options that contracting parties have lacking such clauses, namely what measures can be ordered by a court called to revise a convention whose equilibrium was broken.

Any of the effects generated by contractual imprevision requires certain conditions included in paragraph 3 of article 1271 to be met; depending on their level of dependency on the activity of the parties, we may discuss a two-fold classification of such conditions[11]. Thus, it is necessary that an *exceptional external cause* occurs which affects a *validly concluded synallagmatic contract in progress* and which makes the performance *excessively onerous* and *obviously unfair for one of the parties* (objective conditions); there are two more *subjective conditions:* the debtor should not have expressly assumed the risk of changes in circumstances and such assumption cannot be reasonably inferred, namely the debtor should have attempted, in a reasonable time and in good faith, to renegotiate the contract.

The scope of this institution does not include unilateral legal acts and deeds, but only bilateral or unilateral contracts to be performed in time, with the exception of aleatory contracts by nature or by the will of the parties. This difference leads to practical implications, as in the case of unilateral contracts a party may only request the decrease of its performance or a change of the manner of performance, while synallagmatic agreements allow, in addition, the possibility to request the court, as provided by law, to order the termination of the

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[5] Similar provisions are to be found in art. 6.2.1.-6.2.3. of the UNIDROIT principles of international commercial contracts.

[6] Cristina Elisabeta Zamșa in Fl. A Baias, E. Chelaru, R. Constantinovici, I. Macovei (coordinators), *Noul Cod civil – comentariu pe articole*, C.H.Beck Publishing House, Bucharest, 2012, p. 1331.

[7] L. Pop, I.-F. Popa, S. I. Vidu, *Tratat elementar de drept civil. Obligațiile – conform Noului Cod civil*, Universul Juridic Publishing House, Bucharest, 2012, p. 154.

[8] O. Lando, H. Beale, *Principles of European Contract Law. Parts I and II. Combined and Revised*, Kluwer Law International Publishing House, The Hague, 2000, p. 325.

[9] Y. Picod, *Le devoir de loyauté dans l'exécution du contrat*, L.G.D.J. Publishing House, Paris, 1989, p. 204.

[10] R.I. Motica, E. Lupan, *op.cit.*, p. 76; L. Pop, I.-F. Popa, S. I. Vidu, *op.cit.*, p. 155; P. Vasilescu, *Drept civil. Obligații – în reglementarea Noului Cod civil*, Hamagiu Publishing House, Bucharest, 2012, p. 455-456.

[11] P. Vasilescu, *op.cit.*, p. 457.

contract[12], proposals having also been made to only apply the theory of imprevision to commutative contracts and to contracts of successive performance[13].

In what regards the imbalance prone to initiate a discussion on the concept of imprevision, it was shown that it may result either from an excessive disproportion between the performances of the two parties or from the contract exhausting its usefulness[14]. Regarding the first aspect, we have to mention that the concept does not refer to a mathematical imbalance, but takes into account a series of criteria which, in aggregate, allow one to find that the items of the object of the contract no longer concur to the performance of the contract. In what regards the exhaustion of contract usefulness, this may be inferred from the disappearance of cause in the course of contract performance, as the continued existence of the cause is of interest in verifying the efficacy of contracts in time.

The doctrine issued prior to the entry into force of the New Civil Code claimed that imprevision shall determine the revision of the contract and that the relation between the two concepts - *revision* and *theory of imprevision* - is a whole-part relationship[15]. In a broad sense, contract revision includes imprevision in its content and also aims at other court or legal interventions or amicable settlements in the contract performance stage. In a restricted sense, revision involves, as the doctrine has emphasised[16], a single effect: *change of quantity of performance.* In the opinion of the same author, the concept of revision (*lato sensu*) survives the entry into force of the New Civil Code, having a "peaceful" coexistence with the solution of *adaptation* of the contract mentioned in the contents of article 1271[17].

Prior to the adoption of the New Civil Code, the effects of the theory of imprevision have been proposed and analyzed in detail[18]: cessation of the contract by way of termination/rescission for cause of imprevision; contract suspension; extension of the contract duration; performance by anticipation of the debtor's obligation; amicable conciliation of the parties; *stricto sensu* revision or direct court intervention with two options: for the purpose of setting limits to the revision of performance and for the purpose of exact determination of the value of performance; the establishment of an obligation to renegotiate the contract or direct court intervention; intervention of the lawmaker by way of regulation, in specific fields, of the limits of *stricto sensu* revision of performance.

By analysing the content of article 1271 of the New Civil Code, the current effects of imprevision may be deducted: adaptation of the contract by negotiation; contract termination by mutual agreement of the parties - both are *principal effects,* namely they have priority, as compared to contract adaptation or contract termination by court intervention - which are *subsidiary effects* of imprevision. At the same time, a party could previously claim a direct court intervention by setting an obligation to renegotiate the contract; however, currently, by

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[12] D. Dobrev, *Impreviziunea, o cutie a Pandorei în Noul Cod civil?*, in Marilena Uliescu (coord.), *Noul Cod civil. Comentarii*, second edition reviewed and supplemented, Universul Juridic Publishing House, Bucharest, 2011, p. 212.

[13]*Ibidem*, p. 218.

[14] For details, see Anne-Sophie Laverfve Laborderie, *La pérennité contractuelle*, L.G.D.J. Publishing House, Paris, 2005, p. 396-399, L. Thibierge, *Le contrat face à l'imprevu*, Editura Economica, Paris, 2011, p. 368.

[15] Cristina Elisabeta Zamșa, *Efectele impreviziunii: adaptarea și încetarea contractului, între negociere și litigiu, prezent și viitor* in R.R.D.A. issue 7/2009, p. 36. The concept of *revision* is also included in the French doctrine; see Anne-Sophie Laverfve Laborderie, *op.cit.,* p. 103; R. Reviriot, *Le droit privé français et la théorie de l'imprévision: Essai sur un aspect de l'interprétation de la loi*, thesis, G. Mathieu Printing House, Nice, 1951, p. 93.

[16] C. Stoyanovitch, *De l'intervention du juge dans le contrat en cas de survenance de circonstances imprevues*, thèse, Marseille, 1941, p. 182 *apud* Cristina Elisabeta Zamșa, *op.cit.* (2009), p. 36.

[17] In supporting this idea, historical and legal arguments have been brought; in detail, see Cristina Elisabeta Zamșa, *op.cit.* (2009), p. 37.

[18] Cristina Elisabeta Zamșa, *Teoria impreviziunii. Studiu de doctrină și jurisprudență*, Hamangiu Publishing House, Bucharest, 2006, p. 180-230. For a brief overview of comparative law in the matter of imprevision, see E. Chelaru, *Forța obligatorie a contractului, teoria impreviziunii și competența în materie a instanțelor judecătorești*, in Dreptul Magazine, issue 9/2003, p. 52-53.

corroborating paragraphs 2 and 3 of article 1271 of the New Civil Code, a conclusion may be drawn that the court intervention will always be subsidiary and subsequent to the attempt to amicably settle the dispute between the parties by way of negotiation [art. 1271 paragraph (3) letter d)]. The introduction of an obligation to negotiate prior to any court intervention is a proof of prudence on account of the lawmaker in what regards the amendment of a contract which is and needs to remain, first of all, the responsibility of the parties[19].

Thus, the contracting parties should attempt to restore the contract equilibrium amicably[20], which also triggers a *related obligation*[21]: the party aiming to invoke imprevision shall have previously notified the counter party on the difficulties it encounters in the performance of the contract, in order to avoid prejudice-generating operations undertaken based on a false belief that the contract can be maintained.

As noticed in recent doctrine[22], the wording of article 1271 of the New Civil Code appears to leave the initiation of negotiations to the debtor, however we believe that the opinion according to which one cannot exclude the possibility that negotiations are initiated by the creditor, should the latter aim to maintain the contractual relation, is grounded[23]. Analyzing the content of article 1271 paragraph (3), the limit of the negotiation obligation becomes evident: *reasonable and fair adaptation of the contract, in a reasonable time.* Due to the various and complex situations which may be encountered in practice, no period was fixed for the parties to reach an agreement on restoring the contract equilibrium, the text only making reference to the concept of *reasonableness.* The court is left to judge on whether this requirement was met, as the court verifies whether the conditions to apply paragraph 2 of article 1271, by way of the court intervention in the contract, have been met.

A first item to be emphasized in this context is that *there is no need to send a notice of delay to the debtor*[24] as this would be against the logic of the imprevision mechanism, which does not involve the debtor being notified on its failure to perform, but, instead, the debtor playing an essential role, as the debtor usually proposes solutions on the contract's future existence.

The Romanian doctrine qualifies the negotiation obligation as *a diligence obligation,* arising from the loyalty and cooperation obligations deducted from the *principle of binding force of the contract*[25]. Recent French doctrine has brought certain detailed interpretations: on the one hand, it involves the achievement of a specific result, in what regards the conduct to be adopted by the parties, and the duty of best efforts, in what regards the purpose aimed at in the negotiations - to reach a compromise, the parties being held by good faith to make their best efforts to save the contract, without necessarily the negotiations resulting in an agreement; on the other hand, it was stated that it is preferred to use the concept of *duty of negotiation,* as any obligation involves a *debitum* and a *obligatio,* an active and a passive subject, and renegotiation cannot be a receivable for one of the parties and a liability for the other party, each party being able to be both the creditor and the debtor of the renegotiation obligation, and this duty is not subject to the general regime of obligations, as it cannot be assigned or enforced[26].

The underlying principle of the renegotiation obligation - *the principle of good faith* - may be regarded as an ethical instrument allowing the existence of a general obligation to

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[19] O. Lando, H. Beale, *op.cit.,* p. 324.
[20] The adoption of such conduct is also encouraged by the editors of the Draft Code of European Contract Law; see, O. Lando, H. Beale, *op.cit.*, p. 324.
[21] R. Reviriot, *op.cit.*, p. 117.
[22] Cristina Elisabeta Zamșa in Fl. A Baias, E. Chelaru, R. Constantinovici, I. Macovei (coordinators), *op. cit.*, p. 1331.
[23] L. Pop, I.-F. Popa, S. I. Vidu, *op.cit.*, p. 160. This is also mentioned in the commentary to Article 6:111 of the Principles of European Contract Law; see O. Lando, H. Beale, *op.cit.*, p. 326.
[24] Cristina Elisabeta Zamșa, *op.cit.* (2006), p. 191-193.
[25] L. Pop, I.-F. Popa, S. I. Vidu, *op.cit.*, p. 159-160.
[26] L. Thibierge, *op.cit.*, p. 448-450.

renegotiate. In this case, a court intervention could be possible, but only to verify whether a party's refusal to take part in the negotiations is a breach of the good faith obligation which could be sanctioned on grounds of contractual liability or not[27].

The renegotiation obligation is the highest form of contractual solidarity[28], but is not unlimited, as it ends where the debtor's obligation begins. The debtor shall be deemed to manifest a disloyal conduct and therefore act in bad faith when it asks for the adaptation of the contract, being aware that the contract equilibrium has been fully compromised and the only option is to terminate the contract[29]. At the same time, loyal renegotiation does not involve an obligation to maintain the contract, but an obligation to prove contract communion, as the creditor is liable only to make proposals allowing the alleviation of the imbalance, and cannot be obliged to sacrifice its own interest; not lastly, the creditor cannot refuse in block all the debtor's proposals in an attempt to maintain the initial contractual situation, as this would represent a breach of the renegotiation obligation, in bad faith. Also, a party's conduct cannot be duplicitous or aim at delaying or fraudulent effects.

Based on the content of article 1371 of the Preliminary Draft on the Reform of the Law of Obligations and of the Law of Limitations (Catala Preliminary Draft)[30], the French Doctrine[31] claimed the sanctioning of the party in breach of its obligation to negotiate in good faith the contract by payment of *punitive damages* in an amount to be established based on the benefits obtained by the respective party.

Therefore, good faith needs to exist for the entire duration of negotiations, in order to avoid a result potentially opposite to the desired one, by worsening the debtor's position further to the creditor obtaining additional unjust gains. The foremost purpose of negotiations is to restore the parties in a relatively balanced position. In order to achieve this, the parties have a wide range of possibilities available, as they may adapt the contract in terms of the performance due, by the way of decreasing or increasing their quantity or by rescheduling the performance, for example by extending the initial term of performance.

The result of negotiations shall be included in an *addendum* to the initial contract[32], and it would be impossible to claim that a novation took place, lacking an agreement between the parties to the contrary, given the provisions of article 1610 of the New Civil Code: *Novation is never presumed. The intention to novate should be unquestionable.* At the same time, the effects resulting from this manner of changing the obligation - settlement of guarantees, loss of exceptions or remedies arising from the initial contract - could not have been considered by the parties at the time of negotiation of the contract, as the parties aim to salvage the initial agreement, all its elements included. In fact, as the doctrine suggestively calls it, a "double fungibility" takes place[33]: the substitute object is fungible for the initial object, and the cause, understood as contract purpose, is not changed.

Should the parties fail to remedy the imbalance which has occurred, and the contract purpose has been completely exhausted, the contract having become "sterile"[34], the parties may find the contract terminated by *contrarius consensus*[35].

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[27] F. Terré, Ph. Simler, Y. Lequette, *Droit civil. Les obligations*, 11th edition, Dalloz Publishing House, Paris, 2013, p. 522.

[28] Y. Picod, *op.cit.*, p. 213.

[29] *Ibidem*, p. 228.

[30] This article provides that: *A person who commits a manifestlydeliberate fault, and notably a fault with a view to gain, can be condemned in addition to compensatory damages to pay punitive damages, part of which the court may in its discretion allocate to the Public Treasury. A court's decision to order payment of damages of this kind must be supported with specific reasons and their amount distinguished from any other damages awarded to the victim. Punitive damages must not be the object of insurance.*

[31] L. Thibierge, *op.cit.*, p. 472.

[32] L. Thibierge, *op.cit.*, p. 464.

[33] A. Ghozi, *La modification de l'obligation par la volonté des parties*, thèse, préf. D. Tallon, L.G.D.J., 1980, p. 33 *apud* L. Thibierge, *op.cit.*, p. 465.

[34] L. Thibierge, *op.cit.*, p. 493.

3. **Limits of court intervention in terms of imprevision**

The revision of the contract in court, on grounds of imprevision, expresses a change to its contents, by court intervention, at the request of one of the parties, in order to reassess the mutual performances of the parties whose equilibrium was broken[36]; it relies on the *principle of good faith*, plus the *demonstrative principle of contractual solidarity*[37].

The court intervention in contracts was long regarded with reluctance[38] both by the doctrine and in practice, and the supporters of this possibility have tried to ground their opinion on the rediscovery of an already existing principle – *the principle of good-faith performance of the contract*[39], which relied on the content of article 970 of the Civil Code (1864)[40].

The possibility of *adaptation* of the contract *in court* has been expressly provided in the current article 1271 paragraph 2 letter a) of the New Civil Code, thus putting an end to past discussions according to which it would introduce a factor of legal uncertainty and would give way to arbitrary interpretations[41].

Particular attention shall be paid to assessing the risk which was or was not previously taken by the debtor. This situation may be overcome in two ways[42]: either by the occurrence of an event which involves a risk that was not taken, or by the importance attached to the risk taken, in virtue of usual foreseeing rules being circumvented by the circumstances of its actual manifestation. The extent of the risk the debtor should have rationally assumed can only be inferred from the entirety of circumstances existing at the time of conclusion of the contract, taking into account the speculative nature of the contract (the higher it is, the more important will the risk be presumed to be), the situation of the parties, the potential initial imbalance between the performances and each party's attitude (for example, the performance of obligations without reserves, the conclusion of new contracts, the initiation of offers to change the agreement, as the debtor is the best "judge" of its own risk)[43]. As opposed to the adaptation by negotiation, whose purpose or content is left to the discretion of the parties, the mentioned text introduces *expressis verbis* the purpose of contract adaptation in court, with reference to the criterion of *fairness*.

In addition, other four sub-criteria were proposed[44] in order to provide guidance to courts in distributing losses and benefits: the criterion of *equivalent performance*, the criterion of *mutual performance*, the criterion of *commutativity*, plus the criterion of *proportionality,* which has been long debated by the French doctrine as well[45]. The correction ordered by the court in view of adapting the contract should aim at the "absorption" of the gap between the usual profit resulting from the differences in the "risk sphere" to which the parties have

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[35] As it was shown, this wording is to be preferred over *mutuus dissensus*; see, Ph. Malaurie, L. Aynès, Ph. Stoffel-Munck, *Drept civil. Obligațiile*, Wolters Kluwer Publishing House, Bucharest, 2010, p. 395.

[36] L. Pop, *op.cit.*, p. 536.

[37] *Ibidem*, p. 540.

[38] Reluctance in granting the court the power to analyze a contract affected by unforeseeability is surprisingly found even in drafts aiming to reform the matter of obligations; thus, article 1135-1 from Catala Preliminary Draft provides that: *In contracts whose performance takes place successively or in instalments, the parties may undertake to negotiate a modification of their contractwhere as a result of supervening circumstances, the original balance of what the parties must do for each other is so disturbed that the contract loses its point for one of them.* As it can be observed, the role of the court is limited to the possibility to order the negotiation of the contract between the parties and to sanction a failure of such negotiations.

[39] Cristina Elisabeta Zamșa, *op.cit.* (2009), p. 44.

[40] The legal text provided: "(1) Agreements must be performed in good faith. (2) They shall bind the parties not only to their express provisions, but to all consequences which the respective obligations arise, according to their nature, in equity, custom or law".

[41] For a presentation of the case law discussing contract unforeseeability prior to the adoption of the New Civil Code, see E. Chelaru, *op.cit.*, p. 55-57.

[42] R. Reviriot, *op.cit.*, p. 93.

[43] *Ibidem*, p. 94-95.

[44] Cristina Elisabeta Zamșa, *op.cit.* (2006), p. 211-213.

[45] Laurence Fin-Langer, *L'équilibre contractual*, L.G.D.J. Publishing House, Paris 2002, p. 367.

consented and the undue profit generated by imprevision[46]. Thus, in order to achieve an equitable distribution of benefits and losses, it is necessary that the debtor bears the portion which reduces its profit margin to zero, and the creditor bears the portion which exceeds the cost of performance[47].

In the same context, we believe the solutions proposed in the comments to the Principles of European Contract Law useful, as they attempted to provide milestones in order to avoid slippages in the case law[48]:

- - dismissal of the request to revise the contract when the "remedy" proposed would be worse than the already existing imbalance; for example when, further to revision, a *hardship* is created for the contracting party which was not initially affected by imprevision;
- changes to contract clauses should ensure the restoration of the contractual equilibrium so that the additional cost generated by the unforeseen circumstances be shared equitably;
- extension of the performance period, increase or decrease of the price, quantities;
- if the core objective - to maintain the contract - can no longer be reached, the court should take into account such obligations that were already performed when setting the contract termination date;
- the payment of an indemnification for a certain period and finding the contract terminated upon the expiry of the agreed deadline; not lastly, the court may order the payment of additional amounts[49].

However, there is a limit imposed on the court, which cannot be ignored: further to the approach taken in order to restore the "balance" of contractual performance, the parties cannot be obliged to accept a different contract. The "correction" applied to the agreement cannot be a novation, as the purpose is not to settle the initially provided obligation and then create a new obligation; at the same time, there is no *animus novandi*, the contractual relationship is not broken but, on the contrary, the parties' will is for it to be maintained[50].

Whenever the unforeseeable event cannot be qualified as *ominous,* but as *nullifying*[51], there is no option for the court but to order the termination of the contract, at the time and under the conditions it establishes [article 1271 paragraph (2) letter b)]. On the other hand, termination may be triggered by the parties' failure to reach an agreement and upon the express request of at least one of the parties for the court to order the termination of the contract. For this last effect of imprevision to be put into practice, the court needs to pay particular attention to the distribution of losses so that, after ordering the termination of the agreement, such termination is not fully borne by the party not affected by the change in the contractual circumstances, as the other party shall bear the normal risk arising from the performance of its obligations.

## 4. **Conclusions**

Long repudiated, always controversial, *the theory of imprevision* seems to have won in doctrine and case law arguments, finding legal consecration in article 1271 of the New Civil Code. In this study we were concerned, in particular, about paragraph 2 of this text, making an analysis of the effects that the mechanism of imprevision may generate should the conditions of its application be met.

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[46] L. Thibierge, *op.cit.*, p. 455.
[47] *Ibidem*, p. 454.
[48] O. Lando, H. Beale, *op.cit.,* p. 326-327.
[49] This last option may be chosen by the court whenever the party affected by unforeseeability is the creditor, and not the passive subject of the obligation relation. This is consistent with the logic of article 6:111 of the mentioned Principles, as it refers to "parties"; therefore, in applying *ubi lex non distinguit, nec nos distinguere debemus,* the European lawmaker intended to apply the mechanism of unforeseeability to both contracting parties, as opposed to the Romanian text which only covers the situation of the debtor.
[50] G. Piette, *La correction du contrat,* Presses Universitaires d'Aix-Marseille Publishing House, Paris, 2004, p. 599.
[51] This "scale" of intensity belongs to the French doctrine; see L. Thibierge, *Le contrat face à l'mprevu*, Editura Economica, Paris, 2011, p. 441.

It is natural that the foremost effect remains the *adaptation by negotiation,* to the extent to which the contract may be salvaged, as it allows safeguarding the connection between the effectiveness of an agreement and the requirements imposed by moral or equity. By default, *court intervention* is only an *ultima ratio,* when the contract equilibrium cannot be restored amicably.

Due to its novelty, contract imprevision will continue to represent the source for new debates, therefore the subject remains open not only in terms of the effects it entails, but also in terms of its conditions and scope, and for this purpose the practice will play an overwhelming role.

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